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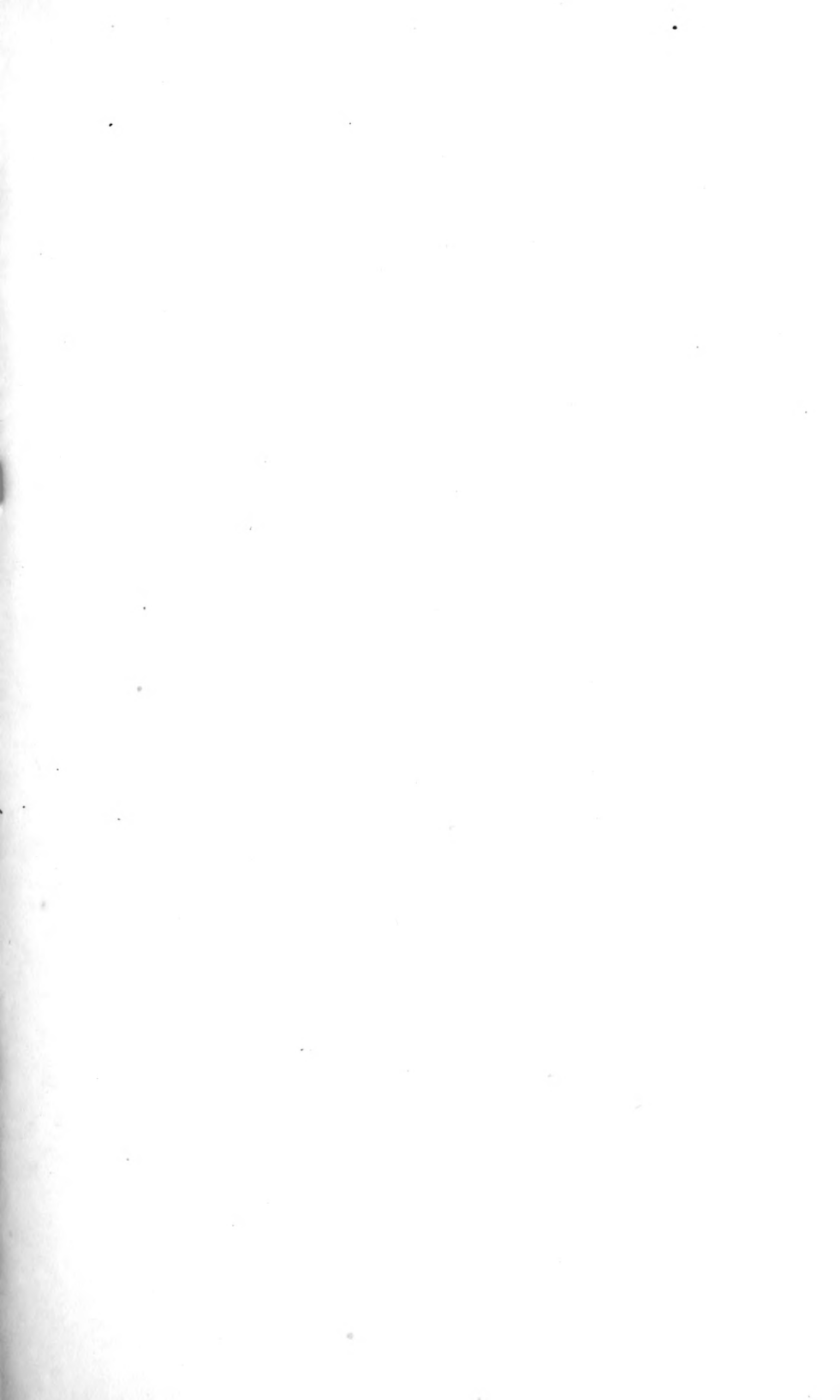
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PRACTICE
IN
SPECIAL PROCEEDINGS
IN THE
COURTS OF RECORD
OF THE
STATE OF NEW YORK
UNDER THE
CODE OF CIVIL PROCEDURE AND STATUTES, WITH FORMS.

BY
J. NEWTON FIERO,
DEAN OF THE ALBANY LAW SCHOOL.

IN TWO VOLUMES.

VOL. II.

SECOND EDITION.

ALBANY, N. Y.
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CHAPTER XIX.

PROCEEDINGS FOR THE DISPOSITION OF THE REAL PROPERTY OF AN INFANT, LUNATIC, IDIOT, OR HA- BITUAL DRUNKARD.

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ARTICLE I.

VIEWS OF THE CODIFIERS.

The matters treated under these sections of the Code consist

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of numerous provisions scattered through the statutes relative to infants, lunatics, and habitual drunkards, and to the disposition of their real estate when either held in trust for others or contracted to be sold by an ancestor, as well as proceedings for the purpose of sale for the immediate benefit of the persons interested.

The codifiers say in their note upon this title when first presented to the legislature that they have consolidated these various enactments so as to provide, so far as practicable, uniform rules and a uniform mode of proceeding for the disposition of the real property of those different classes of persons who are under an incapacity to dispose of their property without the aid of the court. In a very few instances the difference in the character, and particularly in the duration of the incapacity of an infant, and that of a lunatic, etc., or in the mode by which the guardian of the former and the committee of the latter are appointed, has required the retention of a special provision applicable exclusively to one class of cases.

ARTICLE II.

ACTION TO COMPEL CONVEYANCE. §§ 2345, 2346, 2347.

§ 2345. Action to compel conveyance.

In either of the following cases, an action may be maintained against an infant, or a person incompetent to manage his affairs by reason of lunacy, idiocy, or habitual drunkenness, to procure a judgment, directing a conveyance of real property, or of an interest in real property:

1. Where the infant or incompetent person is seized or possessed of the real property, or interest in real property, by way of mortgage, or only in trust for another.

2. Where a valid contract for the sale or conveyance of the real property, or interest in real property, has been made; but a conveyance thereof cannot be made, by reason of the infancy or incompetency of the person in whom the title is vested.

2 R. S. 55, §§ 20, 22 (2 Edm. 56); L. 1874, ch. 446, §§ 9, 23-26 (9 Edm. 931-933), *am'd*; L. 1875, ch. 574, §§ 7 and 8; 2 R. S. 194, ch. 1, §§ 167, 169 (2 Edm. 202).

§ 2346. [Am'd, 1882.] Who may maintain action.

An action may be maintained, in a case specified in the last section, by a person entitled to the conveyance; and, also, in a case specified in subdivision second of that section, by the executor or administrator of the person who made the contract, or of a person who died seized or possessed of the real property, or interest in real property, or by an heir or devisee of either of those persons, to whom the real property has descended, or was devised. The action may be maintained by the committee of the lunatic or other incompetent person; but in that case the court must appoint a special guardian for the incompetent person as prescribed by law, where an infant is defendant, and the proceedings are the same as in a like action against an infant.

Id. R. S., and laws as above.

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§ 2347. Judgment; effect thereof.

A judgment, directing such conveyance, shall not be rendered unless the court, after hearing the parties, is satisfied that the conveyance ought to be made. Upon rendering final judgment to that effect, the court has power to direct the guardian of the infant's property, or the committee of the property of the lunatic or other incompetent person, or a special guardian appointed in the action, to execute any conveyance, or to do any other act, which is necessary, in order to carry the judgment into effect.

2 R. S. 194, § 169, and 2 R. S. 55, ch. 5, § 19 (2 Edm. 56).

It will be noted that these sections do not relate to a special proceeding in any sense in which the term is used, but expressly authorize an action to be brought and a judgment rendered.

Where a contract was made for the sale of lands by a party who died before its performance, leaving an only child as his heir at law, who was a lunatic, it was held that a court of equity might decree a specific performance of the contract, and direct the committee of the lunatic to execute all necessary conveyances for the purpose. *Swartout v. Burr*, 1 Barb. 495. Heirs of a vendor are bound to fulfil his contracts to convey to the extent of the estate that descends to them, and an infant heir is bound to convey, and the statute expressly gave power to compel a conveyance, and its authority was full and express. *Hill v. Ressegieu*, 17 Barb. 162. Specific performance will be compelled between an infant and the surviving party to a contract for sale of lands in cases where it would have been decreed between the original parties, unless there are some intervening equities controlling the case. Willard's Eq. 269, cited, 1 Crary, 462. The court may decree a specific performance by the infant of the contract of his ancestor where the infant is a resident of this State, although the lands contracted to be conveyed are in another State. *Sutphen v. Fowler*, 9 Paige, 280. Where the order of the court directs the infants merely to convey their interest in property for the purpose of fulfilling the contract of the ancestor, personal covenants inserted in a deed executed on their behalf are void. Whether, if the ancestor contracts to convey with covenants as to title, the court has power, under an application under the statute for specific performance, to require the heir to convey by deed containing covenants, *quærc.* Neither infants or guardians appointed for that purpose can convey land except pursuant to the order of the court, and a deed executed without such order or beyond its terms is void. *Hyatt v. Secley*,

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1 Kern. 52. The chancellor refused to grant an order that the infants convey with covenants, in *Matter of Ellison*, 5 Johns. Ch. 261, but protected the purchaser by requiring the money to be invested until the infant became of age, that he might be indemnified if the title should fail.

The guardian should execute the deed by subscribing the name of the infant by him, adding his own name as guardian; if only subscribed by the guardian as such, it is defective. *Hyatt v. Seeley*, 1 Kern. 52.

The equitable power of the court to compel a vendor to execute a new conveyance in order to clothe the purchaser with a record title, where the former deed has been lost, is independent of § 2345; such power is within the general jurisdiction of a court of equity. *Kent v. Church of St. Michael*, 136 N. Y. 17, 49 St. Rep. 22. Section 2345 does not mean that only such actions as there are mentioned may be maintained against an infant or a lunatic or a habitual drunkard; therefore an action for a separation on the ground of cruel and inhuman treatment may be begun against a habitual drunkard, although a committee has been appointed. *Gregg v. Gregg*, 48 Hun, 452, 1 Supp. 453. Proceedings for the sale of an infant's interest in land are absolutely void if not instituted in good faith to sell to a real purchaser, as where they were instituted to transfer the title unencumbered by the infant's interest to his father, even though full value be paid for the infant's interest and no wrong was in fact intended. The court says the statute is intended for the benefit of the infant and cannot be resorted to for the purpose of divesting the infant of title or curing a defect therein. *Weinstock v. Levison*, 14 Supp. 65. Therefore the purchaser of property from a father who has thus obtained the title may refuse to close the sale and have an action for the earnest money. *Weinstock v. Levison*, 14 Supp. 65, *supra*.

The finding of a referee that certain claims are valid against the estate of an incompetent in proceedings by his committee for leave to sell his real estate, is not a judgment within the meaning of § 376, Code Civil Procedure; and therefore in an action against the committee on such claim the finding of the referee is not conclusive, and the plaintiff must prove such claim by proper evidence. *Sheldon v. Mirick*, 144 N. Y. 502, 64 St. Rep. 67, reversing 70 Hun, 41, 53 St. Rep. 500. It seems

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that a specific performance against infant heirs may be had on an equitable title taken under an agreement to convey. *Peck v. Kirtz*, 15 St. Rep. 600.

ARTICLE III.

APPLICATION TO DISPOSE OF REAL PROPERTY AND PETITION.

§§ 2357, 2348, 2349, 2350. Rule 55.

§ 2357. Certain sales, etc., prohibited.

Real property, or an interest in real property, shall not be sold, leased, or mortgaged, as prescribed in this title, contrary to the provisions of a will, by which it was devised, or a conveyance or other instrument, by which it was transferred, to the infant, or incompetent person.

§ 2348. [Am'd, 1893.] Application to dispose of real property; in what cases.

In either of the following cases real property, or a term, estate, or other interest in real property, or an inchoate right of dower in real property, belonging to an infant or a person incompetent to manage his affairs, by reason of lunacy, idiocy, or habitual drunkenness, may be sold, conveyed, mortgaged, released, or leased, as prescribed in the following sections of this title :

1. Where the personal property, and the income of the real property, of the infant or incompetent person, are, together, insufficient for the payment of his debts, or for the maintenance and necessary education of himself and his family.

2. Where the interests of the infant or incompetent person require, or will be substantially promoted by such disposition, on account of the real property, or term, estate, or other interest in real property, being exposed to waste or dilapidation; or being wholly unproductive; or for the purpose of raising funds to preserve or improve the same; or for other peculiar reasons, or on account of other peculiar circumstances.

3. Where an action might be maintained, against the infant or incompetent person, to procure a judgment, directing the conveyance of the real property, or interest in real property, as prescribed in §§ 2345 and 2346 of this act.

§ 2349. Id.; by whom.

An application, in either of the cases prescribed, in the last section, must be made by the petition of the general guardian, or the guardian of the property of the infant; or by the committee of the property of the lunatic or other incompetent person; or by any relative, or other person, in behalf of either. Where the application is in behalf of an infant of the age of fourteen years or upwards, the infant must join therein. Where the application is made to the Supreme Court, the petition must be presented at a term held within the judicial district, in which the property, or a part thereof, is situated.

§ 2350. [Am'd, 1893.] Contents of petition.

The petition must be verified in like manner as a verified pleading in an action in the Supreme Court. It must set forth the grounds of the application; and in a case specified in subdivisions first and second of the last section but one, other than a case where the application is made for the sale of an undivided interest of the infant or incompetent person in one or more parcels of land in order to avoid an action of partition on the part of his co-tenants, it must also state the particulars and value of the real and personal property, and the amount of the income of the infant or incom-

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petent person; the disposition which has been made of his personal property, and an account of the debts or demands, if any, existing against his estate. In the case above specified where the application is made for the sale of an undivided interest of the infant or incompetent person, the petition must state the particulars and value of the real property in respect to which a sale is desired.

L. 1893, ch. 311.

RULE 55. The petition in proceedings to sell, mortgage, or lease real estate belonging to an infant or lunatic, idiot, or habitual drunkard, shall state, besides the particular grounds for sale, mortgage, or lease of the property, and the other matters required by the Code, the age and residence of the infant, lunatic, idiot, or habitual drunkard, and the name and residence of the person proposed as a special guardian or committee, the relationship, if any, which he bears to the infant, lunatic, idiot, or habitual drunkard, and the security proposed to be given; and also, whether any previous application has been made, and if so, the time thereof, and what disposition was made of the same.

In *Hughes v. Jones*, 116 N. Y. 67, the history of the statutory procedure with regard to sale of real estate of lunatics and incompetents is fully discussed in the opinion, Vann, J., page 74, etc., in which he says, that by an early statute in England, the king had the custody of the lands of idiots. Subsequently, authority was given to the Lord Chancellor to issue a writ or commission to inquire as to idiocy or lunacy, stating the nature of the inquisition. He says, further, "Thus the law came to us from England, and after the revolution the care and custody of persons of unsound mind, and the possession of their estates, which had belonged to the king as a part of his prerogative, became vested in the people, who by an early act confided it to the Chancellor, and afterwards to the courts." The Supreme Court has no power to direct the sale of an infant's real estate, contrary to terms of the will by which he derives title. *Mullen v. Shipman*, 6 Abb. N. C. 343. Under the Revised Statutes, a contingent estate of an infant could not be sold by order of the court. *Matter of Dodge*, 40 Hun, 443. Infants unborn are not seized, hence courts cannot sell their interests, because such interests do not exist; they can sell only interests existing. If a child should be born, it will be vested with the interest in the share substituted for real estate and held by its co-heirs. *Bowman v. Tallman*, 28 How. 482. A sale contrary to a will or conveyance by which an infant acquires title is void. *Matter of Turner*, 10 Barb. 552; *Forman v. March*, 11 N. Y. 544. But the provisions of the statute did not apply to a trust estate held by an infant. *Wood v. Mather*, 38 Barb. 473, affirmed, 44 N. Y. 249.

The court has no right to order the sale of the real estate of an

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idiot, lunatic, or habitual drunkard, independent of the provisions of the statute, even for the payment of debts, and with the consent of the heir at law and next of kin. *Matter of Pettit*, 2 Paige, 596.

The same rule is applicable to sales of real estate of infants. *Baker v. Lorillard*, 4 N. Y. 257; *Horton v. McCoy*, 47 id. 21; *Rogers v. Dill*, 6 Hill, 416; *Matter of Turner*, 10 Barb. 552; *Onderdonk v. Mott*, 34 id. 106. It has in a later case been said that a court of equity has jurisdiction independent of the statutory provisions. *Wood v. Mather*, 38 Barb. 473, affirmed, 44 N. Y. 249. A private statute authorizing such sale was held valid in *Cochran v. Van Surley*, 20 Wend. 365; *Brevoort v. Grace*, 53 N. Y. 245. Prior to the statute of 1864, the court would not direct the sale of real estate of a lunatic, idiot, or habitual drunkard, so long as there was personal estate applicable to the purpose. *Matter of Kellet*, 3 Paige, 199; *Matter of Hoag*, 7 id. 312. The same rule is now embodied in subdivision 1 of this section. Before the estate of a lunatic can be sold the court must acquire jurisdiction of the person and estate of the lunatic by issuing a commission and the return thereon. *Matter of Paige*, 8 How. 220. Such jurisdiction must be acquired in proceedings in this State. *Matter of Perkins*, 2 Johns. Ch. 4; *Matter of Neally*, 26 How. 402. The jurisdiction given to the court in case of a lunatic can only be exercised in the manner the statute directs; it being a special proceeding, an omission of a substantial requirement renders proceeding invalid. *Matter of Valentine*, 72 N. Y. 184. In proceedings to sell real estate of infants, the rule applies that in proceedings in derogation of common law by which the title of one is to be divested and transferred to another, every requisite of the statute having the semblance of benefit to the infant must be complied with, or the title will not pass. *Battell v. Torrey*, 65 N. Y. 294. It was held in *Brasher v. Van Courtlandt*, 2 Johns. Ch. 400; s. c. id. 242, that the real estate of a lunatic might be sold for the payment of his debts upon an action by a creditor for that purpose without a petition by the committee, but the sale must be conducted under the direction of the court in substantially the same manner as if sold on such petition. The sale of the real estate of infants under the statute was intended for the better education and maintenance of the infants, and for their special and substantial benefit. *Matter of Whitaker*, 4 Johns. Ch. 378. It was held,

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Matter of Mason, 1 Hopk. Ch. 122, that whenever it appeared satisfactorily to the court that the situation of the infants as regards maintenance and education would be improved, the order would be made as in case of property exposed to waste and dilapidation, or an unproductive village lot. It is good ground for sale that expense of a suit in partition may be avoided thereby. *Matter of Corydon*, 2 Paige, 566. But the fact that a sale would increase the income of an adult tenant in common is not sufficient ground. *Matter of Jones*, 2 Barb. Ch. 22. A sale contrary to the provisions of a devise is void. *Matter of Turner*, 10 Barb. 553; *Rogers v. Dill*, 6 Hill, 415. In order to authorize a sale, the infants must have title to the property; a vested remainder may be sold. *Baker v. Lorillard*, 4 N. Y. 257. But the future estate of an infant in lands will not be ordered to be sold except under very special circumstances. *Matter of Jones*, 2 Barb. Ch. 22. The term "real estate" includes every freehold estate and interest in lands, and where there is a vested remainder in fee there is a seizin in law within the statute, and the court has jurisdiction to order a sale. *Jenkins v. Fahey*, 73 N. Y. 355; *Matter of Haight*, 14 Hun, 176. The contingent interest of an infant under a devise conditioned upon the remarriage of the mother, to whom the primary estate is devised, is not an estate which can be sold under the statute. *Matter of Dodge*, 40 Hun, 443. The court cannot order or direct the guardian of an infant to consent to the abandonment of a strip of land left after the apportionment of the remainder for the purposes of a street, and the execution of a release or quit-claim therefor, without compliance with the provisions of the statute; and a quit-claim executed without such compliance will convey no title. *Battell v. Burrill*, 10 Abb. (N. S.) 97, affirmed, 50 N. Y. 13. The provisions of section 2355, since enacted, however, authorize the final order to contain such directions respecting the time, manner, and conditions of a sale or conveyance directed thereby, as the court thinks proper to insert therein.

Where an infant plaintiff in an action against a railway company for maintaining their railroad in front of his premises obtains a judgment which provides that the railroad company shall pay the value of the easement, a release given by the infant upon such payment is a valid instrument and capable of passing title. *Germer v. Metropolitan R. Co.*, 3 Misc. 429, 23 Supp. 167, 52 St. Rep. 445.

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The committee of a lunatic joining with the husband and conveying a lunatic's inchoate right of dower, will not convey a good title free of dower to the mortgagee, as a release of such inchoate right is neither expressly nor impliedly authorized by this title. *Matter of Dunn*, 64 Hun, 20, 45 St. Rep. 831, 18 Supp. 723. The force of this case is annulled by the amendment to this section by Laws of 1893, which adds among other interests in real property which may be disposed of, an inchoate right of dower. The opinion, however, may still be available on the point of the strict construction of the statute relative to disposal of the property of incompetents. The power of a court of equity to dispose of the real property of infants is not inherent but strictly statutory, but it is said by the court that the provision of section 2348 *et seq.* are ample to empower the court on application by or on behalf of infants whose property is in danger of any loss by the failure of duty of a life tenant to pay taxes or make improvements, or for other reason to interfere for their protection. The court says further: "But proceedings under this section are hedged about by safeguards preventing inconsiderate action by courts and by requiring security, protecting infants against the dishonesty of those who undertake to represent them. The court has on repeated occasions declared proceedings instituted under these provisions to be void, when not taken in conformity to statute. *Losey v. Stanley*, 147 N. Y. 560, citing *Ellwood v. Northrup*, 106 N. Y. 172; *In re Valentine*, 72 N. Y. 184; *Battell v. Torrey*, 65 N. Y. 294. Thus in an action brought to foreclose a mortgage an order for the mortgage of infants' real property may be attacked collaterally, when such an order was made without jurisdiction in a proceeding by the trustee of a life estate, which did not include the interests of the infants in remainder, even though the guardian *ad litem* consented to the order. *Losey v. Stanley*, 147 N. Y. 573, reversing 83 Hun, 420. By virtue of this title an infant having no personal estate or income from real estate may have an application to the court for the sale of the real estate for the infant's support and maintenance, and upon such sale the court should allow the infant's guardian for sums expended by him for the infant's support, if such guardian does not intend to donate the cost of living provided by him, for the infant's estate is liable for the moneys advanced for the necessities of life. *Hovell v. Noll*, 10 Misc. 547, 64 St. Rep.

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123, 31 Supp. 439. Under this title of the Code the court has power to authorize the mortgaging of the real property, estate, or other interest in real estate belonging to an infant, and a mortgage so authorized will cover whatever interest the infants have, whether that interest or estate is one in possession, or is a vested future estate. And this is true although the income and profits of the land are given to the executors in trust. *Craver v. Germain*, 17 Misc. 252. No jurisdiction is given over the real estate of infants except that conferred by statute. The statute only gives the power to sell or mortgage, and thus the courts cannot authorize an exchange of infants' real estate. *Moran v. James*, 20 Misc. 235, affirmed *Moran v. James*, 21 App. Div. 184; which case holds in addition that an infant cannot give a bond and mortgage to equalize the values of such exchanged property. See this case for the form of judgment or foreclosure of mortgage thus attempted to be given. Where a statement of facts was agreed upon on appeal, and from statement it appeared that an infant owned no personal estate, and had no means of support, and that his real estate was unproductive and that an application had been made for the sale of his real property and the application granted, it cannot be objected by the defendant refusing to take the title offered, that the reason for the application was not fully set out in the petition as required by § 2350. *Ryder v. Wood*, 29 St. Rep. 63, 8 Supp. 422. In a proceeding instituted by a general guardian to lease the real estate of an infant, the relatives of the infant may be made a party to the proceeding, and thereupon they have a right to appear and except to the report. The court will not direct a general guardian against his objection to lease an infant's property for saloon purposes in order to obtain a better rent, as a personal liability might devolve upon such guardian under the Civil Damage Act. *Matter of Stafford*, 3 Misc. 107, 51 St. Rep. 833, 22 Supp. 707. The mother, the uncle, and the general guardian have been held proper parties to present the petition. *Matter of Lansing*, 3 Paige, 265; *Matter of Whitlock*, 32 Barb. 48; *O'Reilly v. King*, 28 How. 408. It is said in the last case that the fact that the petitioner is a creditor of the infant does not disqualify him from making the application. It will be noted that *Cole v. Goulay*, 79 N. Y. 527, was decided previous to the Code, and that there was at that time no statutory provision re-

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quiring an infant over fourteen to join in the petition, as is now provided for in this section. The application is *ex parte*, and should be made to the court at Special Term. *Matter of Bookhout*, 31 Barb. 348. The county court is open, however, at all times for such applications. Section 355, Code Civil Procedure; see *Brown v. Snell*, 57 N. Y. 286.

Precedent for Petition by Committee of Lunatic.

IN ULSTER COUNTY COURT.

To the County Court of Ulster County :

The petition of Thomas Snyder, of Marbletown, Ulster County, New York, as the committee of the person and property of Cornelia DuBois, an idiot, respectfully shows :

That the said Cornelia DuBois, who resides in the said town of Marbletown, with the family of John H. DuBois, her deceased brother, was, on the 14th day of May, 1887, duly adjudged an idiot by virtue of an inquisition theretofore duly ordered by the county court of Ulster County, and your petitioner was duly appointed the committee of her person and property by an order of said court made on the 25th day of June, 1887 ; and your petitioner thereupon duly qualified as such committee and entered upon his duties as such.

That the said Cornelia has no personal property except her clothing, which does not exceed the sum of \$200 in value. That she is incapable, because of her mental condition, of earning anything toward her support. That the only real estate owned by said idiot is an undivided one-third of a certain farm in said town of Marbletown, which was purchased by Wessel DuBois, her father, from Henry O. Lawrence, and containing about one hundred and seventy acres. That the said idiot now is living on said farm, in the family of her deceased brother, John H. DuBois. That the other undivided two-thirds of said farm is owned, as tenants in common, by the infant children of the said John H. DuBois, deceased, who are named as follows : Huldah, Rachel M., Benjamin, Salina, Mary C., Dewitt, Charles, and Catherine DuBois, and subject to the dower right of their mother, Hannah DuBois, in said two-thirds. That the value of the real estate owned by the said idiot would not exceed the sum of about \$7,500. That the said idiot personally has never received any income from her interest in said farm, she having made her home with her said brother and his family, and they having had the benefit of the use of her part of said farm. That the fair rental value of the interest in said farm, after paying taxes, insurance, and ordinary repairs, would be the sum of not exceeding \$350 annually.

That the sale of the real estate of the idiot, or of a portion thereof, is necessary to procure funds for her support, and also to pay any claims which may be established against said idiot for her support in the past.

That there is an opportunity of selling a portion of such real estate, and the portion to be sold is hereinafter particularly de-

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scribed, to one George Wood, for the sum of \$6,000, for the interest of the said idiot therein. That the widow and children of the said John H. DuBois have agreed to sell their undivided two-thirds of said premises to said George Wood at the price of \$12,000, and an order of this court has been granted directing a sale of the interest of said infants in said property to the said Wood at that price. That the said idiot has a title in fee-simple in such one-third, and it is important to complete said sale to said Wood, as sales of real estate are not of frequent occurrence, and if this sale is not completed it may be a long time before another opportunity may present itself. That the premises proposed to be sold to said Wood are the undivided one-third of the following described premises. (Here insert description.)

That your petitioner is informed and believes that the estate of John H. DuBois, deceased, and Hannah DuBois, have claims against the said idiot for her clothing and support, but the exact amount of such claims this petitioner is not able to state.

Your petitioner, therefore, prays that the said real estate of said idiot, hereinbefore particularly described, may be sold by and under the direction of this court; that Thomas Snyder, of said town of Marbletown, who is not related to said idiot, but who is the committee of her person and estate, duly appointed, may be appointed her special guardian with respect to this proceeding, and that all such proceedings may be had in the premises as may be proper and necessary for that purpose, and Jacob L. Snyder and Silas Snyder, each of said county, are proposed as sureties for the said Thomas Snyder as such special guardian, to join with him in such penalty and upon such conditions as may be required

Dated June 28, 1887.

THOMAS SNYDER.

(Add verification as to pleading.)

I hereby consent to be appointed the special guardian for the above idiot, with respect to the proceedings and for the purposes mentioned in the above petition.

(Add acknowledgment.)

THOMAS SNYDER.

ULSTER COUNTY, ss. :

Daniel Coddington, of Marbletown, said county, and Silas Sheely, of said town, being each severally sworn, doth each for himself depose and say, that he is acquainted with the above-named idiot and her pecuniary circumstances, and that the material facts and circumstances alleged in the foregoing petition are true, and that they are each of them disinterested.

(*Jurat.*)

(Signatures.)

Precedent for Bond. (See § 2351, *post.*)

Know all men by these presents, that we, Thomas Snyder, Jacob L. Snyder, and Silas Snyder, all of Marbletown, said county, are held and firmly bound unto Cornelia DuBois, of said town, who was, by the county court of Ulster County, duly declared an idiot, by an order of date of June 1, 1887, in the sum of \$15,000, to be paid to the said Cornelia DuBois, her heirs, executors, administrators or as-

Art. 3 Application to Dispose of Real Property and Petition.

signs, for which payment well and truly to be made we bind ourselves and our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the 12th day of July, 1887.

WHEREAS, On the 25th day of June, 1887, the above-bounden Thomas Snyder, by order of the Ulster County court, was appointed the committee of the person and property of said lunatic, and was this day by said court duly appointed the guardian of said idiot in this proceeding : Now, therefore, the condition of this obligation is such that if the above-bounden Thomas Snyder shall faithfully discharge his said trust as a guardian of the above-named idiot for the purpose of selling and disposing of certain real estate belonging to said idiot, and shall pay over, invest, and account for all moneys received by him as such guardian in the special proceedings, according to the directions of any court having authority to give directions in the premises, and shall observe the directions of the court in relation to the said trust, then this obligation to be void ; otherwise to remain in full force and virtue. (Signatures.) [L. s.]

(Add justification and acknowledgment.)

Precedent for Petition for Sale of Infant's Real Estate for Payment of Debts.

IN THE ULSTER COUNTY COURT.

To the County Court of the County of Ulster :

The petition of Claude Snyder, an infant under the age of fourteen years, by Mary A. Snyder, his mother and next friend, respectfully shows to this court that your petitioner, Claude Snyder, is an infant, who became four years of age on December 6, 1884, and that he resides with his said mother in the town of Rosendale, said county and State of New York ; that said infant has no father and no general guardian ; that said infant is the only child and heir at law of William Snyder, deceased, late of said town of Rosendale, who died intestate, March 17, 1883 ; that the only property belonging to said infant is the property which he inherited from his said father ; that such property, so inherited by said infant, consisted of real estate as follows : A dwelling-house and about three acres of land connected with it of the value of about \$2,500 ; also a wood lot in said town containing about seven acres, of the value of about \$200, and a lot of thirty acres in said town, hereinafter particularly described, which is of the value of about \$1,500 ; that neither of said lots are incumbered, and now belong to said infant, subject to the dower right therein of Mary A. Snyder, the mother of said infant : the thirty-acre lot and the wood lot are unoccupied, and the dwelling-house lot is occupied by the said Mary A. Snyder and said infant ; that the household furniture of the deceased was not sufficient in value to make up the \$150 which the widow was entitled to out of the household furniture ; that on May 29, 1883, the said widow and her brother, Stephen S. Mowle, were appointed administratrix and administrator of William Snyder, deceased, and have collected in and converted into money all the personal property of the deceased, except the household furniture

 Art. 3. Application to Dispose of Real Property and Petition.

claimed by the widow, and the same amount to the sum of \$296.32 ; that the administrators make no claim for commissions or personal expenses ; that the said administrators have duly advertised for the presentment of claims against the estate of the deceased to be made to them, such advertisements being made under the order of the surrogate of Ulster County,

That the following claims have been presented, and which, as your petitioner verily believes, constitute all the debts and liabilities of the deceased.

That said amounts are stated without interest being added.

Benjamin F. Snyder, Brooklyn, N. Y.....	\$ 50 00
Lillie Snyder, Brooklyn, N. Y.....	325 00
D. D. Addis & Son, East Kingston	30 40
Robert Herdman, Eddyville.....	20 15
Anthony D. Relyea, Creek Locks.....	62 12
Newton Davis, Eddyville.....	14 30
Geo. C. Smith, Rondout.....	29 50
A. E. Porter, Creek Locks	9 46
George Milham, Creek Locks.....	9 00
Van Wagonen & Schwarman, Creek Locks... ..	8 84
Stephen S. Mowle, Creek Locks.....	2 50
Bills paid by the administrator for doctors' bills, funeral expenses, and expenses in settling the estate.. ..	231 61
	<hr/>
	\$1,040 38

That of the personal property, \$296.32, the widow claims as follows, by law, the sum of \$150. That the mother of the said infant is of the age of twenty-eight years, and is willing to take the present value of her dower interest in the real estate, the sale of which is hereby applied for, to be computed by the usual tables fixing such present value.

That the said dwelling-house produces an income of about \$48 per year, a sum not more than sufficient to pay taxes, insurance, and repairs. That said wood lot does not produce any income.

That the said thirty-acre lot produces an income of about \$40 a year.

That to pay the debts of the said deceased, and to discharge the real estate of the said infant from the lien of said debts, authority is hereby asked to sell the following real estate of said infant, being the said thirty-acre lot, and which lot is described as follows :

All that certain lot or piece of land situate and lying in the said town of Rosendale, and bounded and described as follows : On the north by lands of John McAvoy ; on the west by lands of Connelly & Shaffer, the Hudson River Cement Company, and George Freston ; on the south by lands of Peter C. Lefever and David I. Gue, and on the east by lands of Peter C. Lefever, John Freston, and Patrick Lowrey, containing about thirty acres, subject, however, to whatever right the Hudson River Cement Company may have in said lot. That the interest of the infant in said lot is an estate in fee subject to the dower of his mother.

Art. 4. Appointment of Guardian and Bond.

That an opportunity is now offered to sell such real estate for the sum of \$1,500, which is supposed to be a fair price therefor, and the mother of said infant is willing to convey her dower interest in said real estate at that valuation.

That this proceeding is taken to avoid the expense and delay of an application to the surrogate's court to sell such real estate to pay the debts of said William Snyder, deceased.

Your petitioner, therefore, prays that the real estate above described may be sold by and under the direction of this court; that Stephen S. Mowle, an uncle of said infant, of said town of Rosendale, may be appointed the special guardian of the said infant with respect to this proceeding, and that all such proceedings may be had in the premises as may be proper and necessary for that purpose, and that Peter C. Lefever and Jacob A. Van Wagonen, both of said town of Rosendale, are proposed as sureties for the said Stephen S. Mowle, as such special guardian, to join with him in a bond in such penalty and upon such conditions as may be required.

Dated the 30th day of April, 1885.

MARY A. SNYDER.

COUNTY OF ULSTER, SS. :

Mary A. Snyder, of said county, named in the above petition, being duly sworn, says that she has heard the foregoing petition read and knows the contents thereof; that the same is true to her knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

Subscribed and sworn to before me, } MARY A. SNYDER.

this 30th day of April, 1885. }

A. VAN BRAMER,

Notary Public.

I hereby consent to be appointed the special guardian for the above-named infant, with respect to the proceedings and for the purposes mentioned in the above petition.

STEPHEN S. MOWLE.

COUNTY OF ULSTER, SS. :

On this 30th day of April, 1885, before me personally came Stephen S. Mowle, to me known, and known to me to be the person who signed the foregoing consent, and acknowledged that he executed the same.

A. VAN BRAMER,

Notary Public.

ARTICLE IV.

APPOINTMENT OF GUARDIAN AND BOND. §§ 2351, 2352, 2353.

Rule 57.

§ 2351. [Am'd, 1863.] Bond of committee of lunatic, etc.

An application to sell, mortgage, or lease real property, or an interest in real property, of a lunatic, idiot, or habitual drunkard, cannot be granted, unless a committee of his property has been appointed. Upon such an application, if it is made by the committee, the court must make an order, directing him to file with the clerk, a bond, in such a form, in such an amount, and with such sureties, as it directs, conditioned

 Art. 4. Appointment of Guardian and Bond.

for the faithful discharge of his trust; for the paying over and investing of, and accounting for, all money received by him in the special proceeding, according to the direction of any court having authority to give directions in the premises; and for the observance of the directions of the court, in relation to the trust. If the application is made by any other person, an order must be made thereupon, requiring the committee to show cause why he should not file such a bond. If, after hearing the committee, the court is of opinion, that there is probable cause for granting the application, it may make an order, requiring the committee to file such a bond; or, if the committee so elects, or fails to file the bond as directed in the order, it may appoint a suitable person to be the special guardian of the incompetent person, with respect to the proceedings; who must thereupon file such a bond. Where an application is made to release an inchoate right of dower, application must be made by the husband of the lunatic, idiot, or habitual drundard and may be made before or after a committee has been appointed. The court may appoint the husband special guardian, and he must file a bond as herein provided.

L. 1893, ch. 239.

§ 2352. [Am'd, 1893.] Id.; of guardian of infant.

Upon an application to sell, mortgage, or lease real property or an interest in real property of an infant, the court must appoint a suitable person to be the special guardian of the infant with respect to the proceedings, who must thereupon file with the clerk a bond as prescribed in the last section. Any trust company authorized by the laws of this State to act as general guardian of the estate of an infant without giving security may be appointed such special guardian, and in such case the court in the order of appointment may dispense with the giving and filing of any such bond.

L. 1893, ch. 268; see § 475.

§ 2353. Bond; how prosecuted.

Upon a breach of the condition of a bond, given as prescribed in either of the last two sections, the court must direct it to be prosecuted for the benefit of the person injured.

RULE 57. Unless the court otherwise specially directs, the security required on a sale of the real estate of an infant shall be a bond of the guardian, with two sufficient sureties, in a penalty of double the value of the premises, including the interest on such value during the minority of the infant, each of which sureties shall be worth the penalty of the bond over and above all debts, which bond shall be duly acknowledged and accompanied with affidavits of justification made by the sureties, or a similar bond of the guardian only, secured by a mortgage on improved and unincumbered real estate within the State, of the value of the penalty of the bond.

Sections 2351 and 2353 substantially re-enact the rule of chancery (Laws 1815, chap. 106, § 2), which provides that an action cannot be maintained upon the bond of a guardian against his sureties until after an accounting in equity by the guardian, but this has no application in a case where an infant sues a guardian personally for a specific fraud. Such action is an action for damages for fraud and conspiracy, and it is not an action either against the principal or sureties of the bond. *Koch v. Lefrois*, 61 Hun, 207, 40 St. Rep. 563, 15 Supp. 930. The sure-

Art. 4. Appointment of Guardian and Bond.

ties on the bond of a committee of a lunatic given under §§ 2337 and 2830 of the Code are not liable for the failure of such committee to pay over moneys illegally received on the sale of the real estate of a lunatic. Had such proceedings been irregular, a bond would have been required under § 2351 and on this the sureties would have been liable. *Johnson v. Ayres*, 18 App. Div. 500.

It is no defence by one refusing to take title to an infant's real estate that the bond of the special guardian was directed to be filed in the county clerk's office if such bond was filed in the proper place, according to § 2352. *Ryder v. Wood*, 29 St. Rep. 64, 8 Supp. 423. The general guardian of the infant is the proper person to be appointed special guardian for sale of his real estate. *Matter of Wilson*, 2 Paige, 412; *Matter of Lansing*, 3 id. 265. It was said in *Matter of Tillotsons*, 2 Edw. 113, that a part owner with the infant of land, and who has a claim against the latter's share, is hardly a proper person to be appointed special guardian, but the fact that the relative petitioning for his own appointment as special guardian was a creditor of the infant, and that his claim grew out of a volunteer expense so incurred, does not raise a jurisdictional question. Any error of the court in this respect is to be corrected by appeal or direct proceeding to vacate. *Battell v. Torrey*, 65 N. Y. 294. A special guardian appointed to sell infant's real estate cannot convey such property to himself; where he has done so in good faith, the defect may be cured by opening the proceeding and conveying to a third person. *Buderus v. Immen*, 20 Week. Dig. 88. Where real estate was ordered sold for the benefit of five infants, the guardian giving each infant a separate bond, it was held that the sureties should qualify in the aggregate penalties of the several bonds. *Anonymous*, 4 How. 414. The security cannot be dispensed with, although the petition sets forth the inability of the infants to procure such security. *Matter of Thorne*, 1 Edw. Ch. 507. The rule held that if the bond is not given and filed at the time of applying for leave to mortgage, it cannot subsequently be given in pursuance of an order of the court, a mortgage so given is void, in *Agricultural Ins. Co. v. Barnard*, 26 Hun, 302; is reversed, s. c. 96 N. Y. 525. A bond of a guardian is not void because given before application is made to the court in the matter, especially where the approval and filing were subsequent

 Art. 5. Referee to Inquire into Application and Order Thereon.

to the application. *Center v. Sproat*, 22 Hun, 146. An infant may sue his guardian for a positive specific fraud without suing upon the bond given pursuant to §§ 2351 and 2353, which latter could not be done until after an accounting by the guardian. *Koch v. Lefrois*, 61 Hun, 205, 40 St. Rep. 563, 15 Supp. 930.

It is a breach of the condition of a bond where the special guardian fails to make and file a report of the actual disposition of the remainder of the moneys after paying out the sums directed by the court. There is no warrant for the application of such moneys except the express authority of the court. *Hunt v. Hunt*, 58 N. Y. 666. Before an action can be maintained at law against the sureties upon a bond given upon the appointment of a special guardian, the guardian must be called to account and ordered to pay over by a court of competent jurisdiction, but the sureties are not necessary parties to the proceedings in which the order for payment is made. *Brown v. Balde*, 3 Lans. 283, affirmed as *Brown v. Snell*, 57 N. Y. 286. Where the guardian is cited and fails to appear, and an order is made fixing a sum in his hands, an action can be maintained against his sureties. *Center v. Sproat*, 22 Hun, 146. Where an order is made requiring the special guardian of an infant to mortgage its real estate and apply the proceeds thereof to the payment of certain specified debts, he cannot, after having received the money, refuse to pay any of the debts, on the ground that the infant is not liable for it. When the guardian renders an account of his proceedings, and procures an order confirming the report without notice to the creditor whose claim he has refused and neglected to pay, such order furnishes him no protection, and the same will, on application of the creditor, be vacated and the guardian directed to pay him the amount in his hands, applicable to the payment of his claim, with interest from date of order of confirmation. *Matter of Lampman*, 22 Hun, 237.

ARTICLE V.

 REFEREE TO INQUIRE INTO APPLICATION AND ORDER
 THEREON. §§ 2354, 2355. Rule 56.
§ 2354. [Am'd, 1893.] Reference to inquire into the application.

Upon the presentation of the petition, and the filing of the bond where the filing of such a bond shall be necessary, the court must make an order appointing a suitable

 Art. 5. Referee to Inquire into Application and Order Thereon.

person a referee to inquire into the merits of the application. The referee must examine into the truth of the allegations of the petition; hear the allegations and proofs of all persons interested in the property, or otherwise interested in the application, and report his opinion thereupon, together with the testimony, with all convenient speed.

L. 1893, ch. 268.

RULE 56. The referee appointed on such petition must report as to whether a sale, mortgage, or lease of the premises (or any portion, and what portion thereof) would be beneficial to the infant, lunatic, idiot, or habitual drunkard, and the particular reason therefor, and whether the infant, lunatic, idiot, or habitual drunkard is in absolute need of having some, and what portion of the proceeds of such sale, mortgage, or lease, for the purpose provided in section two thousand three hundred and forty-eight of the Code, in addition to what he might earn by his own exertions; and such referee shall also ascertain and report the value of the property or interest to be disposed of, specifically as to each separate lot or parcel, and whether there is any person entitled to dower or life estate, or estate for years in the premises, and the terms and conditions on which it should be sold.

And the referee's report shall give such further facts as are necessary or proper on the application.

The facts shall be proved on such reference by evidence of at least two disinterested persons, in addition to that of the petitioner, and the report shall not refer to the petition or any other paper for a statement of fact.

§ 2355. [Am'd, 1893.] Final order.

Upon the filing of the referee's report, and after examining into the matter, the court must make a final order upon the application. In a proper case a final order, confirming the referee's report, must direct that the real property or term, estate, or other interest in real property, or a part thereof, or an inchoate right or dower therein, as is necessary, or as justice requires, be mortgaged, let for a term of years, sold, released, or conveyed by the special guardian, appointed as prescribed in this title, or by the committee of the property of the lunatic or other incompetent person. The final order must also contain such directions respecting the time, manner, and conditions of the sale, release, or conveyance directed thereby, as the court thinks proper to insert therein.

L. 1893, ch. 639.

It was held in *Matter of McIlwaine*, 15 Abb. 91, that the court could in a clear case dispense with the order of reference in proceedings to sell infants' real estate, but in the *Matter of Valentine, a Lunatic*, 72 N. Y. 184, it was held, concurring with views expressed in *Battell v. Torrey*, 65 id. 294, and reversing 10 Hun, 83, as to infants' real estate, that the requirement of the statute as to reference is substantial, and cannot be dispensed with. An omission to refer constitutes a fatal defect in proceedings under the statute. A purchaser under such defective proceedings may move to have his title perfected by new or amended proceedings, or to have the purchase money refunded.

Art. 5. Referee to Inquire into Application and Order Thereon.

Order Appointing Special Guardian and Referee.

At a term of the Ulster County court, held at the judge's chambers, in the city of Kingston, on the 12th day of July, 1887 :

Present :—Hon. William S. Kenyon, *County Judge*.

<p>In the Matter of the Petition of Cornelia Dubois, an Idiot, for the sale of lands.</p>	}
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On reading and filing the petition of Cornelia DuBois, of Marbletown, said county, an idiot, by Thomas Snyder, the committee duly appointed of her person and estate duly executed, praying for the sale of certain premises therein described, and setting forth, among other things, that said premises produce only a small income ; that the idiot needs the proceeds of said sale for her support and to pay bills against her for her support in the past ; that the interest of said idiot in said premises is an undivided interest, and the other owners wish to sell ; and that a sale of such premises would be more for the interests of such idiot and all concerned, which said petition is duly verified and supported, as to its material facts and circumstances, by the affidavits of two disinterested persons, and praying for the appointment of Thomas Snyder, of the town of Marbletown, county of Ulster, and State of New York, as special guardian of said idiot, for the purpose of selling and conveying such premises ; and, on motion of William T. Holt, attorney for said petitioner,

It is ordered, that the said Thomas Snyder, on his executing the bond required by law in the penal sum of \$12,000, with two sufficient sureties, approved as to its form, sufficiency, and execution by a justice of this court, or the county judge of the county of Ulster, by his approbation indorsed thereon, and filing the same with the clerk of the county of Ulster, be and he is hereby appointed, on such conditions, special guardian of the said idiot, with respect to the proceedings.

And it is further ordered, that it be referred to Walter S. Fredenburgh, who is hereby appointed a referee to inquire into the merits of the application, to examine the said petition, hear the allegations and proof of all persons interested in the property, or otherwise interested in the application, and report his opinion thereon, together with the testimony, with all convenient speed.

And it is further ordered, that no proceedings shall be had upon such reference until the guardian produces a certificate of the said clerk, that the requisite security has been duly proved or acknowledged, and filed agreeably to the order of the court, and showing the name of the officer by whom the same was approved, and that said certificate be annexed to the report.

WM. S. KENYON,
Ulster County Judge.

Art. 5. Referee to Inquire into Application and Order Thereon.

Referee's Report.

ULSTER COUNTY COURT

In the Matter of the Petition of Cornelia Du-
Bois, an Idiot, for leave to sell real estate.

COUNTY CLERK'S OFFICE, }
COUNTY OF ULSTER, } ss. :

I do hereby certify that the security required by the order of this court made on the 12th day of July, 1887, in the above matter, to be given by Thomas Snyder, named as special guardian therein, has been acknowledged and duly approved by William S. Kenyon, county judge and filed in my office, agreeably to the order of this court.

Dated the 18th day of July, 1887.

[L. s.]

ISRAEL SNYDER,
Clerk.

ULSTER COUNTY COURT.

In the Matter of the Petition of Cornelia Du-
Bois, an Idiot, for leave to sell real estate

In pursuance of an order of this court, made in the above matter, on the 12th day of July, 1887, by which it was referred to me, the subscriber, as referee, to inquire into the merits of the application ; to examine into the truth of the allegations of the petition ; hear the allegations and proofs of all persons interested in the property, or otherwise interested in the application, and report my opinion thereon, together with the testimony, with all convenient speed,— After being duly sworn as such referee, I do report, that the said special guardian has produced before me the certificate required by said order, that the requisite security has been duly acknowledged and approved and filed, and that I have proceeded to examine into the truth of the allegations of the petition ; have heard the allegations and proofs of all persons interested in the property, or otherwise interested in the application, and I do report that the same have all been sufficiently proved, and that I am satisfied that all the material facts stated in the said petition are true, and that a sale of the real estate belonging to the said idiot would be for the benefit of said idiot, and that the reasons for my opinion are :

That the interest of said idiot in the premises is an undivided interest ; that the other tenants in common wish to sell and have entered into a contract to sell their interest in said premises.

That the idiot has no income or means of support, and needs the proceeds of the sale of the premises for her support, and to pay bills for her support in the past ; that the premises yield only a small income, and insufficient to furnish a support for said idiot.

W. S. FREDENBURGH,
Referee.

 Art. 5. Referee to Inquire into Application and Order Thereon.

Indorsed :—"Ulster County Court—In the Matter of the Petition of Cornelia DuBois, an idiot, for the sale of lands."

1887, July 18, Read on motion.

WM. S. KENYON,

Ulster County Judge.

**Precedent for Referee's Report ; Sale of Infant's Real Estate
for Payment of Debts.**

ULSTER COUNTY COURT.

In the Matter of the Petition of Claud Snyder,
an Infant, for the sale of lands. }

COUNTY CLERK'S OFFICE, }
COUNTY OF ULSTER, } ss. :

I do hereby certify that the security required by the order of this court, made on the 2d day of May, 1885, in the above matter, to be given by Stephen S. Mowle, named as special guardian therein, has been acknowledged and duly approved by William S. Kenyon, judge of Ulster County, and filed in my office, agreeably to the order of this court.

Dated the 4th day of May, 1885.

[L. s.]

M. S. DECKER, *Deputy Clerk.*

ULSTER COUNTY COURT.

In the Matter of the Petition of Claud Snyder,
an Infant, for the sale of lands. }

In pursuance of an order of this court, made in the above matter, on the 2d day of May, 1885, by which it was referred to me, the subscriber, as referee, to inquire into the merits of the application ; to examine into the truth of the allegations of the petition ; hear the allegations and proofs of all persons interested in the property, or otherwise interested in the application, and report my opinion thereon, together with the testimony, with all convenient speed,—After being duly sworn as such referee, I do report that the said special guardian has produced before me the certificate required by said order ; that the requisite security has been duly acknowledged and approved and filed, and that I have proceeded to examine into the truth of the allegations of the petition ; have heard the allegations and proofs of all persons interested in the property, or otherwise interested in the application, and I do report that the same have all been sufficiently proved, and that I am satisfied that all the material facts stated in the said petition are true, and that a sale of the real estate belonging to the said infant would be for the benefit of said infant, and that the reasons for my opinion are :

That William Snyder, father of said infant, died intestate at Creek Locks, Ulster County, N. Y., on or about March 17, 1883, seized in fee of about three acres of land at Creek Locks, with dwelling-house thereon in which he lived at the time of his death, also a wood lot of about seven acres, situated in the town of Rosendale, Ulster County,

Art. 5. Referee to Inquire into Application and Order Thereon.

N. Y. ; also a lot of land comprising about thirty acres, situate in the town of Rosendale aforesaid, and leaving Mary A. Snyder, widow, and Claud Snyder, then of the age of two years, and Frank Snyder, of the age of six months, sole heirs at law him surviving.

That letters of administration were thereafter issued upon his estate to his widow, Mary A. Snyder, and Stephen S. Mowle, and that they have converted all the personal property of their said intestate into money, except the household furniture, which does not exceed in value \$150, and that the proceeds of such personal property, in the aggregate, amounts to \$296.32.

That the said widow, Mary A. Snyder, claims and will take the \$150 allowed her by law out of the said sum of \$296.32, and that the administrators have agreed and will release their claims for fees and charges against the said estate, which will leave in their hands the sum of \$146.32 for the payment of debts and the expenses of administration. That said administrators have advertised for creditors to present their claims against the estate of said William Snyder, intestate, and that the time for the presentation of such claims has expired, and that the following claims have been presented and are valid and subsisting debts against said decedent's estate, and are just demands and owing :

Benjamin F. Snyder, Brooklyn, N. Y.....	\$50 00
Lillie Snyder, Brooklyn, N. Y.....	325 00
D. D. Addis & Sons, East Kingston, N. Y.....	30 40
Anthony D. Relyea, Creek Locks, N. Y.....	62 12
George C. Smith, M. D., Rondout, N. Y.....	29 50
A. E. Porter, Creek Locks, N. Y.....	9 46
George Milham, Creek Locks, N. Y.....	9 00
Van Wagoner & Schawarman, Creek Locks, N. Y.....	8 84
Stephen S. Mowle, Creek Locks, N. Y....	250 00
Robert D. Herdman, Eddyville, N. Y.....	6 61
Newton Davis.....	14 30
	<u>\$795 23</u>

That besides the above claims of \$795.23, the administrators have advanced out their own funds and paid valid and subsisting debts against said decedent's estate as follows :

Kingston Daily Leader, for publishing notice to present claims.....	\$13 25
Deed for cemetery lot.....	15 00
John Newkirk, Wm. Snyder's funeral.....	37 00
George L. Wachmyer, Frank Snyder's funeral.....	27 00
Town tax on real estate, 1883.....	33 76
Town tax on real estate, 1884.....	20 10
School tax, 1883.....	7 00
Louis Wooster, carriages for funeral.....	15 00
Insurance on property.....	10 50
Tombstone, Osterhoudt & Dart.....	53 00
	<u>\$231 61</u>

Art. 5. Referee to Inquire into Application and Order Thereon.

That the funeral charges are just and reasonable, and that the above amount of \$231.61 is now justly due and owing to Stephen S. Mowle, of Creek Locks, Ulster County, N. Y., who has advanced the money out of his own funds to take up said claims, and that he holds them against the estate of said decedent.

That the debts against said estate amount, in the aggregate, exclusive of interest, to the sum of \$1,026.84, and that none of them are secured by any judgment or mortgage which is a lien upon decedent's real property.

That the net proceeds of the personal property of said decedent's estate will pay \$146.32 of said debts, leaving \$880.52 unpaid and unprovided for. That the said sum of \$880.52 is chargeable upon said decedent's real estate, the real estate of said infant.

That since the death of the said William Snyder, intestate, his son, Frank Snyder, has died, leaving the infant, Claud Snyder, sole heir at law of his estate, subject to the right of dower and life estate of said Mary A. Snyder therein. That the annual income of all the above real estate is less than \$100 annually, against which there are charges of taxes and insurance, and that the estate has no funds, nor has said infant wherewith to pay said debts, nor is there any way to pay and discharge said debts except the sale of a part of said decedent's real estate, or so much thereof as may be necessary to payment of debts.

That Stephen S. Mowle, special guardian of said infant, has been offered \$1,500 for the thirty-acre lot above mentioned, \$800 thereof to be paid in cash at the signing of the contract, and the balance of \$700 to be paid October 1, 1885, upon the delivery of the deed, and that Mary A. Snyder, the mother of said infant, who is twenty-eight years of age, is willing to unite in the deed at that valuation, and take a gross sum in lieu of her dower and life estate therein. And I do further report that it will be to the best interest of the said Claud Snyder to sell the said thirty-acre lot for the said sum of \$1,500, and that said sum is a fair and good price for said lot, and that to sell said lot in these proceedings will avoid the expense and delay of an application to the surrogate's court for leave to sell such real estate to pay the debts of said William Snyder, deceased, together with the expenses of administration.

I do further report that \$331.95 is the purchasing or gross value of the right of dower of Mary A. Snyder in the said premises, or the proceeds thereof at the valuation of \$1,500.

I do further report that the said sum of \$880.52 is the aggregate of amount of the claims against said estate (exclusive of interest), and that the same should be paid from the proceeds of said sale after the payment of the dower interest of the said Mary A. Snyder, aforesaid.

And I do further report that \$95.44 is the purchasing or gross value of the life interest of Mary A. Snyder, aforesaid, as the mother of Frank Snyder, deceased, in the said premises, or the proceeds thereof at the valuation of \$1,500, after deducting the dower interest aforesaid, and the payment of the debt aforesaid. And I do further report the balance of the proceeds of said sale is the money of, and belongs

 Art. 5. Referee to Inquire into Application and Order Thereon.

to said infant, Claud Snyder. All of which is respectfully submitted.

DE WITT ROOSA,

Dated May 13, 1885.

Referee.

The referee's report shall give such further facts as are necessary or proper on the application. The facts shall be proved on such reference by evidence of at least two disinterested persons, in addition to that of the petitioner, and the report shall not refer to the petition or any other paper for a statement of fact. Under the Chancery practice, it was sufficient for the referee to briefly state the facts, and state that he found the allegations of the petition to be true. *Matter of Morrill*, 4 Paige, 44. But under the rule as it now stands, an order directing the real estate of an infant to be mortgaged for the payment of its debts should contain a statement of the objects to which the avails are to be applied, and should not refer to any other paper for a specification of such object. The report of the referee in such proceedings should also specify such objects and should not refer to the evidence for a statement thereof. *Matter of Lampman*, 22 Hun, 241.

A deed reciting the appointment of a guardian for infants, in which they were named as parties of the first part without the guardian's name being mentioned, and which was executed and acknowledged by infants and by guardian without the addition of his title to his signature, indicating the character in which he was acting, is not such a conveyance as the purchaser is bound to accept. *Matter of Hyatt*, 11 N. Y. 52. But where an order of Chancery adjudged that the special guardian who signed the petition should execute a sufficient conveyance of the interest of the infants and a deed was executed by him in his own name, as special guardian, the names of the infants appearing in the deed, it was held to be in proper form, and that it was not necessary to have it executed in the names of the infants. *Cole v. Gourlay*, 79 N. Y. 527.

The codifiers, in explaining § 2355, call attention to the provisions made for disposing of the property of an infant by four different methods. "The first two by mortgage or lease call for no particular remarks; with respect to the remaining methods by sale or conveyance, the former includes the latter, but the converse of the proposition is not true, and the word 'or' has, therefore, been interposed between 'sold' and 'conveyed,' because, where a sale is ordered, for instance, to pay debts, the court does

 Art. 5. Referee to Inquire into Application and Order Thereon.

not order a conveyance until after the sale is reported, and where property held in trust is to be conveyed, or a contract of sale is to be specifically performed, the only thing remaining to be done by the court is to order a conveyance and determine the conditions, if any, upon the performance of which it is to be made."

Order for Guardian to Contract.

At a term of the Ulster County court, held at the judge's chambers in the city of Kingston, on the 18th day of July, 1887:

Present :—Hon. William S. Kenyon, *County Judge*.

In the Matter of the Petition of Cornelia Du- Bois, an Idiot, for leave to sell real estate.	}
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On reading and filing the report of Walter S. Fredenburgh, referee appointed in the above matter by this court, bearing date the 18th day of July, 1887, from which it appears satisfactory to this court, that a sale of the estate, right, and interest of said idiot in the premises referred to, and the sale of which is asked for in the petition in this proceeding, is required by the interest of such idiot, and for reasons and circumstances in such report stated, and that the interests of all concerned will be promoted thereby; on motion of William T. Holt, attorney for said petitioner, it is

Ordered, that the said report be and the same is hereby confirmed.

And it is further ordered, that Thomas Snyder, the special guardian for said idiot, be and he is hereby authorized and empowered to contract for the sale and conveyance of all the right, title, and interest of the said idiot in and to such real estate, subject to the approbation of this court, but not for a sum less than the sum specified by said referee in his report as the value thereof, and upon the terms and conditions in said report specified.

And it is further ordered, that before executing any deed or instrument of conveyance of the said premises to the purchaser thereof, the said guardian report to this court, upon oath, the terms and conditions of the agreement made by him for the sale of such premises, and the name of the purchaser.

WILLIAM S. KENYON,
Ulster County Judge.

The form of a release of an easement in an infant's real estate should be discussed and settled at the time the judgment is signed, or brought before the court below on a motion for resettlement. *Garber v. Metropolitan Elevated R. Co.*, 3 Misc. 429, 23 Supp. 167, 52 St. Rep. 445.

Art. 6. Agreement for Conveyance ; Conveyance and its Effect.

ARTICLE VI.

AGREEMENT FOR CONVEYANCE ; CONVEYANCE AND ITS EFFECT.

§§ 2356, 2358.

§ 2356. [Am'd, 1893.] Report of sale, etc.

Before a sale, mortgage, release, or lease can be made pursuant to the final order, the special guardian or the committee must enter into an agreement therefor, subject to the approval of the court ; and must report the agreement to the court under oath. Upon the confirmation thereof by the order of the court, he must execute, as directed by the court, a deed, mortgage, release, or lease. Where the final order directs the execution of a conveyance, in the first instance, for the purpose of fulfilling a contract, or because the property is held by way of mortgage or trust only, the guardian or committee, executing the conveyance, must report the conveyance to the court, under oath.

L. 1893, ch. 639.

§ 2358. [Am'd, 1893.] Effect of conveyance, etc.

A deed, mortgage, release from inchoate right of dower, or lease, made in good faith, as prescribed in this title, either upon an application in behalf of the infant or an incompetent person, or pursuant to the directions contained in a judgment rendered against him, has the same validity and effect, as if executed by the person, in whose behalf it was executed, and as if the infant was of full age, or the lunatic, idiot, or habitual drunkard was of sound mind and competent to manage his or her affairs ; and a release of an inchoate right of dower, as authorized by this title, shall have the same effect as if the wife had joined with the husband in a deed or conveyance of the property affected thereby and had duly acknowledged the same in the manner required by law to pass the estate of married women.

L. 1893, ch. 639.

It is requisite that the special guardian of an infant enter into an agreement in writing, with the purchaser of real estate, stating the terms of sale. *Matter of Hazard*, 9 Paige, 365. In *Agricultural Insurance Company v. Bernard*, 26 Hun, 302, it was held that a mortgage given by order of the court was void, because no report of agreement to mortgage was made by the court before the execution of the mortgage, citing *Stillwell v. Swarthout*, 81 N. Y. 109, and *Battell v. Torrey*, 65 id. 294, both of which decisions should be examined by the practitioner in this connection, in view of the fact that the case first cited was reversed, 96 N. Y. 525. The syllabus on reversal states the decision as holding that the requirement that, in case of sale, the sale shall be reported to the court on oath of the committee, and confirmed by the court before a conveyance is executed, does not apply to a mortgage, but the opinion scarcely goes to that point. That decision holds, among other things, that the filing of a petition which shows the valid debt of a lunatic requiring the disposition of his property to

 Art. 6. Agreement for Conveyance ; Conveyance and its Effect.

enable his committee to pay, vests the court with jurisdiction of the subject-matter under the act, and such jurisdiction would not be divested by subsequent irregularities in the proceeding unless they were taken in violation of some express provision of statute. It is also held a failure to file a bond is not a jurisdictional defect. In *Battell v. Torrey*, 65 N. Y. 294, it was held that in case of an infant the right to execute a mortgage is by the statute regulating such proceedings made to depend upon a confirmation by the court of the agreement reported, and it was held necessary. It is probable that the different decisions are based upon a difference in the statutes, but as the statute now says as to the bond and the agreement that they *must* be made, it would be unsafe to omit either. The decisions were cited under the Revised Statutes. Other owners may join with the infant in the contract. *O'Reilly v. King*, 28 How. 408. The word "enter" in § 2356 of the Code, providing that a special guardian must enter into an agreement to sell, subject to the approval of the court, means "enter into a written agreement;" but before the statute, the guardian might make a profitable verbal contract to sell. *Hardie v. Andrews*, 13 Civ. Pro. 413.

Report of Special Guardian of Agreement to Sell.

This agreement made and entered into this 18th day of July, 1887, by and between Thomas Snyder, the special guardian of Cornelia DuBois, an idiot, of Marbletown, of the first part ; and George T. Wood, of the same place, of the second part. The party of the first part to sell and convey to the party of the second part, in consideration of the sum of \$600, the premises described in the petition in this proceeding, and the party of the second part to take said premises, at said price, as soon as he is furnished a good title to the whole premises, of which the premises in question is an undivided one-third. Price to be paid when deed delivered.

In witness whereof the parties hereto have set their hand and seal, the day and year first above written. THOMAS SNYDER,

In presence of *Special Guardian for* CORNELIA DuBOIS.
R. BERNARD. GEORGE T. WOOD.

Agreement to Sell.

ULSTER COUNTY COURT.

In the Matter of the Petition of Cornelia Du-
Bois, an Idiot, for leave to sell real estate. }

In pursuance of an order of this court made in the above matter on

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the 18th day of July, 1887, I, the subscriber, the special guardian therein named, do report, that I have entered into an agreement (subject to the approval of this court), for the sale of all the right, title, and interest of the above-named idiot, in and to the premises mentioned in such order and in the petition in this matter, with George T. Wood, of Marbletown, said county, upon the following terms and conditions : the said George T. Wood to pay therefor the sum of \$600 cash, on obtaining a good title to the whole premises, of which this is the undivided one-third, which agreement is hereto attached.

And I do further report, that the terms and conditions on which I have made such agreement, subject to the approbation of this court, are the best terms upon which I could sell the said property, and that, in my opinion, the security above mentioned will be ample security for the payment of the balance of the purchase money not paid down and the interest thereon.

Dated the 18th day of July, 1887.

THOMAS SNYDER.

COUNTY OF ULSTER, ss. :

Thomas Snyder, the special guardian above named, being duly sworn, says he has heard read the foregoing report by him subscribed, and knows the contents thereof, and that the same is true to his knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Subscribed and sworn to before me, } THOMAS SNYDER.
this 18th day of July, 1887. }

V. B. VAN WAGONEN,

Notary Public.

Order of Confirmation ; Sale of Idiot's Real Estate.

At a term of the Ulster County court, held at the judge's chambers, in the city of Kingston, on the 18th day of July, 1887 :

Present:—Hon. William S. Kenyon, *County Judge.*

In the Matter of the Petition of Cornelia Du-
Bois, an Idiot, for leave to sell real estate. }

On reading and filing the report of Thomas Snyder, the special guardian of the idiot above named, made in pursuance of an order of this court, dated the 18th day of July, 1887, stating that in pursuance of such order he had entered into an agreement, subject to the approval of this court, with George T. Wood, of Marbletown, said county, for the sale of all the right, title, and interest of the said idiot in and to the real estate mentioned in said order, upon certain terms and conditions in such report stated : Now, on motion of William T. Holt, attorney for said petitioner, it is

Ordered, that the said report and the agreement therein recited be, and the same are, hereby ratified and confirmed, and that the real

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property described in said petition be sold and conveyed by said special guardian.

And it is further ordered: that the said special guardian, in the name of and for the said idiot, execute, acknowledge, and deliver to the said George T. Wood a good and sufficient deed and conveyance of all the estate, right, title, and interest of the said idiot in and to the said premises aforesaid, upon his complying with the terms and conditions upon which, by the said agreement, the deed was to be delivered.

And it is further ordered, that out of the said purchase money the said special guardian pay to the attorney for the petitioner the sum of \$25 for costs of this proceeding, and that he pay to W. S. Fredenburgh, the referee herein, the sum of \$5, and that he retain the balance of said purchase money as the committee of the person and estate of the said Cornelia DuBois, subject to the direction of this court on giving the security required by law.

WM. S. KENYON,
Ulster County Judge.

Order of Confirmation; Sale of Infant's Real Estate.

At a term of the Ulster County court, held at the judge's chambers, in the city of Kingston, on the 18th of May, 1885:

Present:—Hon. William S. Kenyon, *County Judge.*

In the Matter of the Petition of Claud Snyder, an Infant, for the sale of lands.

On reading and hearing the report of Stephen S. Mowle, the special guardian of the infant above named, made in pursuance of an order of this court, dated the 13th day of May, 1885, stating that in pursuance of such order he had entered into an agreement, subject to the approval of this court, with the Hudson River Cement Company, of the town of Ulster, Ulster County, N. Y., for the sale of all the right, title, and interest of the said infant in and to the real estate mentioned in said order, upon certain terms and conditions in such report stated: Now, on motion of V. B. Van Wagonen, attorney for said petitioner, it is

Ordered, that the said report and the agreement therein recited be, and the same are, hereby ratified and confirmed, and that the real property described in said petition be sold and conveyed by said special guardian.

And it is further ordered, that the said special guardian, in the name of and for the said infant, execute, acknowledge, and deliver to the said Hudson River Cement Company a good and sufficient deed and conveyance of all the estate, right, title, and interest of the said infant in and to the said premises aforesaid, upon its complying with the terms and conditions upon which, by the said agreement, the deed was to be delivered.

And it is further ordered, that out of the said purchase money the

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said special guardian pay to the attorney for the petitioner the sum of \$90, including \$15, the fees of DeWitt Roosa, the referee herein, for costs of this proceeding, and that he pay to Mary A. Snyder, as payment of the present value of her dower interest in said premises, the sum of \$331.95.

That he pay to said Mary A. Snyder the present value of her life interest in said premises, as mother of her deceased son, \$95.44.

That he pay the debts and funeral expenses of William Snyder, deceased, which, without interest, and after the application of the personal property of the said deceased, amounts to \$880.52, according to the report of the referee herein.

That the balance remaining after the said payment be paid in court for the benefit of said Claud Snyder, by paying the same to the treasurer of Ulster County.

V. B. VAN WAGONEN,

WM. S. KENYON,

County Judge of Ulster County.

Attorney for Petitioner.

Guardian's Deed.

This indenture, made the 15th day of July, in the year of our Lord 1887, between Cornelia DuBois, an idiot, by Thomas Snyder, her special guardian, of the first part, and George T. Wood, of Marbletown, Ulster County, New York, of the second part, witnesseth :

WHEREAS, the above-named idiot, by Thomas Snyder, her committee, heretofore presented to the county court of Ulster County a petition praying for a sale of the right, title, and interest of the said idiot in the premises in said petition mentioned and hereinafter described. Upon which petition, an order of the said court was made at a term thereof held at judge's chambers, in the city of Kingston, county of Ulster, bearing date the 18th day of June, 1887, appointing Thomas Snyder, above named, the special guardian of such infant for the purposes of the said application, and directing that it be referred to Walter S. Fredenburgh, a referee, to ascertain the truth of the facts in such petition alleged ; and thereupon, after the said special guardian had given the security by law required, and the same had been duly approved and filed, such proceedings were afterward had, that by an order of the said county court, made at a term thereof held at judge's chambers, in the county of Ulster, bearing date the 18th day of July, in the year 1887, it was, among other things, in substance ordered, that the above-named Thomas Snyder, as special guardian of such idiot, be authorized to contract for the sale and conveyance of the right, title, and interest of the said idiot in such real estate, for a sum not less than that specified in the referee's report in said order mentioned ; and that such sale, with the name of the purchaser, and the terms thereof, be reported to the said court before the conveyance of such premises should be executed ; and

WHEREAS, The said special guardian, upon terms and in the manner authorized by the said last mentioned order, contracted for the sale of the said premises with George T. Wood, for the sum of \$1,200,

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that being the highest sum offered for the same ; and thereupon the said guardian made his report on oath of such agreement to this court, pursuant to the requisitions of the last recited order, upon which an order was made, at a term of said court, held at the judge's chambers, in the county of Ulster, bearing date the 18th day of July, 1887, confirming such report, approving and confirming such sale, and directing the same to be carried into effect, and ordering the said guardian to execute, acknowledge, and deliver a deed of said premises to the said party of the second part on his complying with the terms on which by said agreement the same was to be delivered ; and

WHEREAS, The said party of the second part has complied with the said terms : Now, therefore, this indenture witnesseth, that the said party of the first part, by Thomas Snyder, her special guardian, for and in consideration of \$1,200, to him in hand paid, before the en- sealing and delivery of these presents, has bargained, sold, granted, released, and conveyed, and by these presents does bargain, sell, grant, release, and convey unto the said party of the second part, his heirs and assigns forever (insert description), with the possession and claim of the party of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances, to have and to hold the same unto the said party of the second part, his heirs and assigns, to them and their only benefit and behoof forever.

In witness whereof, the said party of the first part, by her guardian aforesaid, has hereunto set her hand and seal the day and year first above written.

CORNELIA DU BOIS, Idiot,

By THOMAS SNYDER,

Her Special Guardian.

STATE OF NEW YORK, }
COUNTY OF ULSTER, } ss. :

I certify that on the 24th day of July, 1887, before me appeared Thomas Snyder, to me personally known to be the person described in and who executed the within deed, and acknowledged the execution thereof. (Signature.)

An order directing the sale of real estate of infants, though binding on them so as to protect the purchaser, does not settle the rights of the infants among themselves. *Davis v. DeFreest*, 3 Sandf. Ch. 456. Where an order appointing a special guardian was fraudulently obtained, it and all subsequent orders and proceedings founded thereon were set aside, annulled, and vacated, and the proceedings declared void. *Clark v. Underwood*, 17 Barb. 202. In proceedings for sale of infants' real estate under the statute, where the referee reported that the infant owned an undivided one-half of the premises, and that was the belief of parties during the proceedings, and a sale was ordered, made, and confirmed, and it was determined on ejectment that the infant owned

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only one-third of the premises, the special guardian was required to refund a proper proportion of the purchase money. *Matter of Price*, 67 N. Y. 231, affirming 6 Hun, 513. In *Cole v. Gourlay*, 79 N. Y. 527, the effect of proceedings of this character are discussed in connection with an action of ejectment prosecuted by reason of discovery of a lost will, and the validity of the proceedings are passed upon. The purchaser under such proceedings has a right to a determination of their invalidity in case of a statutory omission, and the proceedings should be amended, or new proceedings taken, or the money paid should be refunded. *Matter of Valentine*, 72 N. Y. 184.

ARTICLE VII.

PROCEEDS OF SALE ; HOW DISTRIBUTED. §§ 2359, 2360, 2361, 2362, 2363, 2364. Rules 58, 59.

§ 2359. [Am'd, 1892.] Proceeds of sale deemed real property.

A sale of real property, or of an interest in real property, of an infant or incompetent person, made as prescribed in this title, does not give to the infant or incompetent person, any other or greater interest in the proceeds of the sale, than he or she had in the property or interest sold. Those proceeds are deemed property of the same nature, as the estate or interest sold, until the infant arrives at full age, or the incompetency is removed. If the infant should die before arriving at full age, or the incompetent person should die before the incompetency is removed not leaving any personal property or not leaving sufficient personal property to pay funeral expenses and expenses that may be necessary or necessarily incurred, then in either or each case the proceeds are to be deemed personal property so far as may be necessary to pay the funeral and other necessary expenses. The proceeds are to be paid upon order of the surrogate's court or court having jurisdiction of the estate of the deceased, to an administrator appointed by the surrogate to administer upon decedent's estate, and after paying all funeral expenses and expenses of administration and any indebtedness, the remainder, if any there be, shall, upon the order of the surrogate, be paid into the hands of the trustee who held the same, to be distributed as the law directs. This act is to include the said proceeds of any infant or incompetent person that has died prior to this amendment, the proceeds now remaining in the hands of a trustee.

L. 1892, ch. 523.

§ 2360. Infant deemed a ward of court.

From the time of the filing of a petition, by or in behalf of an infant, praying for an order directing a conveyance, or a sale, mortgage, or lease of his real property, or of an interest in real property, the infant is considered a ward of the court, with respect to that real property or interest, and the income and proceeds thereof.

§ 2361. [Am'd, 1893.] Disposition of proceeds ; accounting.

The court must, by order, direct the disposition of the proceeds of such a sale, mortgage, or lease. It must direct the investment of any portion thereof belonging to the infant or incompetent person, which is not needed for the payment of debts, or the safekeeping, or the immediate maintenance and education of himself or his family, or for the preservation or improvement of his real property or his interest in

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real property. It must require a report, under oath, of the disposition and investment thereof, to be made as soon as practicable, and must compel periodical accounts to be rendered thereafter, by each person, who is intrusted with the proceeds, or any part thereof. Where an inchoate right of dower is released as prescribed in this title, the court shall make an order requiring one-third of the amount realized on the sale of the property to which the inchoate right of dower attached to be invested by the special guardian, or paid into the court to be held for the benefit of the husband during his life and upon his death for the benefit of the wife during her life, or the court may direct said amount to be paid to the husband upon his giving a bond in the penalty of at least double the amount so received for such release, with at least two sureties, who shall justify in double the amount of such penalty, conditioned for the repayment as the court shall direct by his executors or administrators of such amount upon the death of the husband.

L. 1893, ch. 639.

§ 2362. Particular estates; when included in sale.

Where the real property, or the estate, term, or other interest in real property, directed to be sold, is subject, absolutely or contingently, to a right of dower, or an estate for life, or is subject to an estate for years, in the whole or any part thereof, the person, having the prior right or estate, may manifest in writing his consent, either to receive, from the proceeds of the sale, a gross sum, to be fixed according to the principles of law applicable to annuities, in satisfaction of his right or estate ; or to have a proportionate share of the proceeds of the sale invested, and the interest thereof paid to him, from the time of the investment, or of the commencement of his right or estate, as justice requires, until the determination of his right or estate. Upon filing the consent with the clerk, the final order may, in the discretion of the court, direct a sale of the entire property, to which the right or estate attaches. In such a case, the court must, after the sale, ascertain the value of the right or interest of the person so consenting ; and the final order must either direct the payment from the proceeds of the sale, of the gross sum so ascertained as the value, or the investment of a just proportion of the proceeds, and the payment to him of the interest thereof. But such a gross sum shall not be paid, nor shall such an investment, be made, until an effectual release of the right or estate of the person so consenting, executed to the satisfaction of the court, and duly acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, has been filed with the clerk.

2 R. S. 196, §§ 181, 182 (2 Edm. 204) ; L. 1864, ch. 417 (6 Edm. 292, 293) ; L. 1874, ch. 446, §§ 13, 15, 16 (9 Edm. 932).

§ 2363. Id. ; when belonging to infant, etc.

Where the interest of the infant, or of the lunatic or other incompetent person, consists of a right of dower, or an estate for life, or for years, the final order may authorize the special guardian or committee to join, with the person or persons holding the reversionary estate, in a conveyance of the property to which the interest attaches, so as to release the right of dower, or fully convey the particular estate, on receiving from the proceeds of the sale, a gross sum, in satisfaction of that interest, or a proportionate part of the proceeds, to be invested until the determination of the particular estate ; and, in either case, to be ascertained as prescribed in the last section. Where a proportion of the proceeds is so received by the guardian or committee, for investment, the final order must provide for the investment thereof, until the determination of the particular estate ; and then for the payment thereof to the person entitled thereto.

§ 2364. Debts of infant, etc., to be paid equally.

In the application of money, arising from a sale, mortgage, or lease, made for the purpose of paying debts, as prescribed in this title, the special guardian of the infant,

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or the committee of the property of the incompetent person, must pay all debts, in equal proportion, without giving a preference to a debt founded upon a specialty, or upon which judgment has been taken.

2 R. S. 54, § 15 (2 Edm. 55) ; L. 1874, ch. 46, § 21 (9 Edm. 933).

RULE 58. If the proceeds of the sale exceed five hundred dollars, and the guardian has not given security, by mortgage upon real estate, he shall bring the proceeds into court, or invest the same under the direction of the court, for the use of the infant; and the guardian shall only be entitled to receive so much of the interest or income thereof, from time to time, as may be necessary for the support and maintenance of the infant, without the order of the court. If the infant's interest in the property does not exceed one thousand dollars, the whole costs, including disbursements, shall not exceed twenty-five dollars, and referee's fees not exceeding ten dollars. Where several infants are interested in the same premises, as tenants in common, the application in behalf of all shall be joined in the same petition, although they may have several general guardians; and there shall be but one reference to ascertain the propriety of a sale as to all, and but one bill of costs shall be allowed.

RULE 59. No moneys arising from the sale of the real estate of an infant shall be paid over to his general guardian, except so much thereof, or of the interest or income, from time to time, as may be necessary for his support or maintenance, unless such guardian has previously given sufficient security on improved and unincumbered real estate, to account to the infant for the same, in the usual form. No order shall be made for the payment of any such moneys to any person claiming the same, except upon petition accompanied by a certified copy of the order, in pursuance of which the money was brought into court, together with a statement of the county treasurer, city chamberlain, or other depository of the money, showing the present state and amount of the fund, separating the principal and interest, and showing the amount of each; and the court may take such proof of the truth of the matters stated in the petition, as shall be deemed proper, or may refer the same to a suitable referee to take proof and report thereon.

It seems that the Revised Statutes empowered a court of equity to convert a lunatic's property from realty to personalty and *vice versa*, and it seems that there was never in this State any statute forbidding or limiting the use or conversion of a lunatic's personalty. The provision as to the sale of lunatic's realty, § 2359, binds only the committee and not the court. *Adams v. Smith*, 20 Abb. N. C. 60. If the interest of infants' real estate has been alienated by proceedings under this title, the proceeds of which by virtue of § 2359 are still deemed real property, the court has power to follow such proceeds in the hands of a depositor in trust for heirs. *Hentz v. Philips*, 23 Abb. N. C. 15, 6 Supp. 19. Section 2359, providing for the payment of the proceeds of the real property of an infant after his death to an administratrix, does not apply to the proceeds of an infant's real property sold under a judgment of partition. This section applies only to a case where property is sold because the income is not sufficient for the payment of the infant's debts or main-

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tenance. *Flynn v. Lynch*, 23 Civ. Pro. 369. By virtue of § 2359 moneys received by the committee of a lunatic from a railroad company for the deed of an easement in the lunatic's property retains its character of real estate, and the lunatic's heirs are entitled thereto. *Ford v. Livingston*, 140 N. Y. 162, 55 St. Rep. 254. Under § 2359 the proceeds of the sale of a lunatic's real estate retain the nature of real estate until the recovery of the insane person, and consequently if the lunatic die, it passes to his heirs. *Walrath v. Abbott*, 75 Hun, 445, 59 St. Rep. 641, 27 Supp. 529. Where it was objected that the avails of the property of a lunatic mortgaged by the committee upon order of the court must be disposed of pursuant to § 2361, it was held, in a cause of action for money loaned, and for the enforcement of a lien upon these avails, that the judgment of the court in the action would be as authoritative as an order under § 2361, and that if the plaintiff's views were sustained, the avails of the mortgage were not strictly the property of the lunatic, although in the hands of his committee. *Parmenter v. Baker*, 24 Abb. N. C. 109, 8 Supp. 70. A committee of a lunatic has no power to change the manner of payment of the purchase price of real estate sold for a lunatic, except upon order of the court. *Walrath v. Abbott*, 75 Hun, 445, 59 St. Rep. 641.

The doctrine that the sale of an infant's real estate gives him no greater interest in the proceeds than he had in the property, is a general principle of equity jurisprudence, and will be enforced. If the infant die under age, the proceeds will be subject to the same law of succession as the property which produced them. *Sweczy v. Thayer*, 1 Duer, 286. Where the shares of several infants were determinable fees, with executory devises to the survivors, and the whole estate in the land was sold, it was held, on the death of one of the infants, by which the devise over of her share would have taken effect if the land had not been converted, that her share of the proceeds must be paid to the executory devisees, and that her personal representatives had no right to such share. *Davison v. DeFreest*, 3 Sandf. Ch. 456. The object of the statute was to preserve, during the infant's minority, the character of the property in reference to the statutes regulating descents and distribution. But the character thus impressed upon the proceeds ceases when the infant arrives at his majority and obtains possession of the fund. *Forman v. Marsh*, 11 N. Y.

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544. Same rule is held, *Matter of Finch*, Clarke's Ch. 538. This is true where lands have been partitioned. *Matter of Thomas*, 1 Hun, 473. As also in case of real estate of a lunatic. *Cutting v. Lincoln*, 9 Abb. (N. S.) 436.

The Supreme Court, like the Court of Chancery, exercises general supervision and control over the estates of infants. *Le-Fever v. Laraway*, 22 Barb. 167; *People v. Erbert*, 17 Abb. 395. The county court, in exercising the power conferred on it by law, to order the sale of an infant's real estate within the county, has the same general powers as the old Court of Chancery, and the general rules of equity jurisprudence are applicable. *Brown v. Snell*, 57 N. Y. 286. It is said, however, in *Stiles v. Stiles*, 1 Lans. 90, that the sale of infants' real estate by county court does not constitute them wards of the court.

The same rule as held in *Brown v. Snell*, *supra*, is held in *Matter of Price*, 67 N. Y. 231, and it is said that from the time of the application the infant is to be considered the ward of the court so far as relates to the property affected, its proceeds, or income. The special guardian is an officer of the court, and so long as the proceeds remain in his hands, and until the infant arrives at majority and receives it, the court has control over it and over the proceeding. It may correct any irregularities or errors on the part of its officers in the proceedings so as to protect a party likely to suffer thereby. See, also, *Matter of Mathews*, 27 Hun 254. Where a special guardian took a mortgage on the premises to secure a part of the purchase money, and afterward foreclosed the mortgage, bid off the property, and took a deed of it to himself personally, it was held that he took title as trustee for his ward. *Dodge v. Thompson*, 13 Week. Dig. 104; same principle, *Valentine v. Belden*, 20 Hun, 537. The Supreme Court had jurisdiction under Revised Statutes to compel a guardian, who was appointed by the county court to sell real estate, to pay over money in discharge of his trust. *Spelman v. Terry*, 74 N. Y. 448, affirming 8 Hun, 205.

When the income of an infant is insufficient for its support, the court will sanction application of principal if the proceedings seem to be wise and for the infant's welfare. *Matter of Bostwick*, 4 Johns. Ch. 160; *Voessing v. Voessing*, 4 Redf. 360. A special guardian is not prohibited from taking securities in his own name, but if the fund is to be invested until the majority of the infants,

he cannot receive the principal meanwhile without the order of the court, nor can he receive the interest, except so much as may be necessary for the infant's support, etc. *Swarthout v. Oaks*, 52 Barb. 622. Where a special guardian applied the proceeds of real estate of his ward to payment of debts of the father of the ward, of whom the guardian was the administrator, and from whom the land came to the infant, the act was held to be unwarranted in the absence of authority from the court. *Hunt v. Hunt*, 58 N. Y. 666.

Precedent for Certificate of Officer of Court to be Attached to Petition.

ULSTER COUNTY COURT.

In the Matter of the Petition of William N. Schwab, an Infant, for leave to sell real estate.

I hereby certify that there is now on deposit in this office, to the credit of William N. Schwab, in the above matter, the sum of \$457, and that if the amount is allowed to remain in this office until after January 1, 1884, it will be entitled to interest from July 1, 1883, at the rate of three per cent. per annum.

December 27, 1883.

JOHN DERRENBACHER,
County Treasurer of Ulster County.

Precedent for Petition to Draw Money out of Court.

ULSTER COUNTY COURT.

In the Matter of the Application of William N. Schwab, an Infant, for leave to draw money out of court.

To the County Court of Ulster County :

The petition of George N. Schwab, by Gertrude Schwab, the mother and general guardian of said infant, and the said Gertrude Schwab, in her own behalf, respectfully shows to this court :

That said petitioners are resident of the city of Kingston, said county. That the said William N. Schwab became of the age of eighteen years on the 22d day of March, 1882. That the said Gertrude Schwab has been, by the surrogate of Ulster County, duly appointed the general guardian of the person and estate of said William N. Schwab.

That on or about the 22d day of April, 1882, in proceedings in this court entitled "In the Matter of the Petition of William N. Schwab, an Infant, for leave to sell real estate," an order was granted directing a sale of the interest of the said infant in certain real property on Union Avenue in said city, and directing that of the proceeds of the

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sale of the interest of said infant in said real estate, the sum of \$2,050 be paid into court to the credit of said infant, and interest to be paid to his general guardian during his infancy, and the principal to be paid to him when he should have become twenty-one years of age. That in pursuance of such order said sum was so deposited in said court, by paying the same to the county treasury of said county. That some of said money has since been drawn out, by order of the court, and that there is now in the hands of said treasurer, to the credit of William N. Schwab, the sum of \$457, and interest, as will be seen by the certificate of said treasurer, which is hereto annexed.

That of said money paid into court, there has been drawn out the sum of \$1,593, and expended in the purchase of a house in the said city of Kingston, the title to which is in the said William N. Schwab.

That the petitioner, Gertrude Schwab, expended of her own money in the repairs of said house, more than the sum of \$450, and that the property of the said William N. Schwab has been benefited by such expenditure to the amount of more than \$450. That such expenditure was made at the request of the said William N. Schwab, and for his benefit. That the said Gertrude Schwab has need of the sum of \$457, and prays that that amount of the money she has expended from her private funds in the improvement of the real estate of the said William be repaid to her.

These petitioners, therefore, pray for an order of this court directing the county treasurer of Ulster County to pay the funds in his hands to the credit of the said William N. Schwab, and the interest due thereon, when the same may be drawn, to the said Gertrude Schwab, or to her attorney, Ashley W. Cooper, and your petitioners will ever pray.

Dated December 27. 1883.
(Add verification as to pleading.)

WILLIAM N. SCHWAB,
GERTRUDE SCHWAB.

Precedent for Order to Draw Money, etc.

At a term of the county court of Ulster County, held at the chambers of the judge thereof, in the city of Kingston, said county, on the 4th day of August, 1884 :

Present :—Hon. William S. Kenyon, *County Judge of Ulster County.*

In the Matter of the Petition of William N. Schwab, an Infant, for leave to draw money out of court. }

On reading and filing the petition in the above matter, verified this day by William N. Schwab and Gertrude Schwab, his general guardian, praying that money now on deposit in court to the credit of the said William N. Schwab, in the matter of the petition of Julius G. Schwab and William N. Schwab, infants, for leave to sell real estate, be paid to said general guardian for the maintenance and support of said infant :

Now, on motion of Ashley W. Cooper, the attorney of said peti-

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tioner, on proofs of the facts and matters stated in the petition, it is hereby

Ordered, that the treasurer of Ulster County pay the balance of the money on deposit to the credit of the proceedings herein named to sell real estate, as follows :

To Ashley W. Cooper, the sum of \$25, as his costs and disbursements in this proceeding, and the balance thereof to Gertrude Schwab, as such general guardian, to be applied to the support and maintenance of the said William N. Schwab.

WILLIAM S. KENYON,

County Judge of Ulster County.

It was held in *Matter of Morrell*, 4 Paige, 44, that if several infants were interested in several parcels of land, sold at different times, an allowance might be made for the extra expense beyond the \$25 fixed by the rule. In *Spellman v. Teray*, 74 N. Y. 448, an allowance of \$60 as referee's fees was affirmed. There is no statute providing for commissions to be paid to special guardians in such proceedings, nor is there any fixing the costs and expenses which may be allowed in conducting the same, and no provision is made for attorney's fees, or the expenses of a reference ; all the costs and allowances which can be charged on the fund are in the discretion of the court, and are fixed and provided in the standing rules. *Matter of Mathews*, 27 Hun, 255. The filing of inventories and accounts by the special guardians will be specially enforced. *Matter of Seaman*, 2 Paige, 409.

After the sale has been consummated by the payment of the purchase money and the delivery of the deed to the purchaser, the guardian should make a final report of his proceedings to the court, stating what deduction has been made from the proceeds for costs, whether an effectual release of the widow's dower right has been obtained, and the disposition that has been made of the balance of the proceeds. An order should then be obtained confirming the report, and the sale and conveyance and disposition of the proceeds, and also requiring the guardian to render periodical accounts. *Bennett v. Byrnc*, 2 Barb. Ch. 217.

Final Report of Special Guardian.

ULSTER COUNTY COURT.

In the Matter of the Petition of Cornelia Du-Bois, an Idiot, for leave to sell real estate.

To the County Court of the County of Ulster :

I, Thomas Snyder, special guardian in the above matter, having,

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by an order of this court, made on the 18th day of July, 1887, been authorized and empowered to execute, acknowledge, and deliver to the purchaser of the interest of said idiot in the real estate mentioned and described in the petition in these proceedings, a conveyance, for a sum not less than \$3,600, do hereby certify and report, that I have executed such conveyance as in and by said order directed, and that I have received therefor \$3,600, as follows : Amount paid in full in cash. That out of said sum of \$3,600 I have paid the sum of \$200 for the costs and expenses of these proceedings, and \$200 to John Churchwell to satisfy his interest in said premises ; and that I have taken from the said John Churchwell a discharge in full of his interest ; and that I have disposed of the residue of said sum in the manner directed by this court, as follows, to wit : (Here insert manner of disposition of same.)

THOMAS SNYDER,

Dated July 25, 1887.

Special Guardian.

COUNTY OF ULSTER, ss.:

Thomas Snyder, the special guardian above named, being duly sworn, says he has heard read the foregoing report by him subscribed, and knows the contents thereof, and that the same is true to his knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

THOMAS SNYDER.

Subscribed and sworn to before me, }
 this 25th day of July, 1887. }

JOHN HAMMOND,

*Notary Public.***Final Order Confirmation Sale Infant's Real Estate.**

At a term of the Ulster County Court, held at the judge's chambers, in the city of Kingston, in the county of Ulster, on the 12th day of August, 1887:

Present :—Hon. William S. Kenyon, *County Judge.*

In the Matter of the Application of Cornelia
 DuBois, for leave to sell real estate.

On reading and filing the report of Thomas Snyder, special guardian of Cornelia DuBois, the above-named idiot, bearing date the 25th day of July, 1887, on motion of V. B. Van Wagonen, attorney for said guardian, it is ordered that the said report be and the same hereby is, in all things, ratified and confirmed.

WILLIAM S. KENYON,

Ulster County Judge.

CHAPTER XX.

ARBITRATIONS.

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ARTICLE I.

SCOPE AND EFFECT OF THE PROVISIONS ON THIS SUBJECT.

§ 2386.

§ 2386. Application of this title.

This title does not affect any right of action in affirmance, disaffirmance, or for the modification of a submission, made either as prescribed in this title or otherwise, or

Art. 1. Scope and Effect of the Provisions on this Subject.

upon an instrument collateral thereto, or upon an award made or purporting to be made in pursuance thereof. And, except as otherwise expressly prescribed therein, this title does not affect a submission, made otherwise than as prescribed therein, or any proceedings taken pursuant to such a submission, or any instrument collateral thereto.

Arbitration existed at common law and was early recognized by the statutes of this State. Under the Revised Statutes a complete system was introduced providing for the conduct of arbitrations and the enforcement of awards by the entry of judgment thereon, saving the necessity of an action on the bond. It was also provided that appeals might be taken from the award, and the manner of vacating, modifying, and correcting them was prescribed. The present codification has made but slight changes. The question as to how far the statutes have affected the common-law right to submit to arbitration is discussed. *Cutter v. Cutter*, 48 N. Y. Super. 470. The weight of authority seems to be in favor of the proposition that the common-law right exists to submit matters to arbitration by parol. That other arbitrations are controlled by the statute, at least in part. *Wells v. Lain*, 15 Wend. 99; *Diedrick v. Richley*, 2 Hill, 273; *Cope v. Gilbert*, 4 Denio, 347; *Bloomer v. Sherman*, 5 Paige, 575; *Ross v. Luther*, 4 Cow. 159. But all the provisions of the statute apply only to those cases where the submission is in writing and authorizes a judgment to be entered on the award. *French v. New*, 20 Barb. 482. Where the submission is by parol, the statute has no application. *Cope v. Gilbert*, 4 Denio, 348; *Valentine v. Valentine*, 2 Barb. Ch. 430. A parol agreement to submit matters which cannot be determined by a parol arbitration is void. *French v. New*, 2 Abb. Ct. App. 209; S. C. 28 N. Y. 147. Arbitration relates only to the submission of matters for final determination, not to the decision of a collateral fact. *Elmendorf v. Harris*, 5 Wend. 516; *Garr v. Gomez*, 9 id. 649. In *Elmendorf v. Harris*, arbitration is defined as "a submission by parties of matters in controversy to the judgment of two or more individuals who are substituted in place of a judicatory established by law, and who are to decide the controversy. It is called a domestic tribunal, and the arbitrators judges of the parties choosing." The act by which parties submit their grievances to the tribunal is called a "submission," the persons selected as judges are termed "arbitrators," and their decision is an "award."

Common-law arbitrations are preserved and the common-law

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principles and rules governing the same are preserved by § 2386. *N. Y. L. & W. W. Co. v. Schneider*, 119 N. Y. 478; see, however, *Lorenzo v. Derry*, 26 Hun, 447, cited in *Van Beuren v. Wotherspoon*, 12 App. Div. 427.

A court of equity will not compel specific performance of an agreement to arbitrate. *Sinclair v. Talmadge*, 35 Barb. 602; *Dunnell v. Keteltas*, 16 Abb. 205; S. C. affirmed, 26 How. 599; *Hurst v. Litchfield*, 39 N. Y. 377. And a statute making arbitration compulsory is held unconstitutional, as depriving a party of trial by jury. *People v. Hayes*, 37 Barb. 440. In *President, etc., of the Delaware & Hudson Canal Company v. Pennsylvania Coal Company*, 50 N. Y. 250, the authorities upon the binding force of agreements to arbitrate are collated and discussed, and it is said that there are two classes of cases; in one class of cases the parties undertake, by an independent agreement, to provide for the settlement of all disputes by arbitration, to the exclusion of the courts; such an agreement is no bar to an action, the agreement only entitling the party to damages. In the other class of cases the agreement which creates the liability qualifies the right by providing that before the right of action accrues, damages shall be determined, or amounts and values ascertained, and this is made a condition precedent; this condition is lawful and the courts will give full effect to it. It is further held that the rule that an agreement to arbitrate is not sufficient to oust a court at law or equity of jurisdiction, is a departure from the general principle that effect should be given to contracts when lawful in themselves according to their terms and the intent of the parties, and it will not be extended or applied to new cases not coming within the letter or spirit of the decisions already made. A large number of cases will be found to be cited and commented upon, and the conclusions arrived at are reached after thorough investigation. It seems that although the submission to arbitrate is in writing, if it be not acknowledged and proved or certified as required by § 2366, it is not a statutory arbitration and is not governed by the provisions of this title. *Van Beuren v. Wotherspoon*, 12 App. Div. 427. It seems that an arbitration which does not comply with the requirements of this title, and where the method of procedure is informal and the award which follows was never confirmed, and where no judgment was entered thereon, that the submission nevertheless is good at common law,

 Art. 2. What Controversies Can be Submitted to Arbitration.

and the award as between the parties possesses the same force and effect as a final judgment in regard to all matters within the scope of the submission. *Burhans v. Union Free School District*, 24 App. Div. 432, citing *Coleman v. Wade*, 6 N. Y. 44; *N. Y. L. & W. W. Co. v. Schneider*, 119 N. Y. 475.

As soon as arbitrators appointed under this title have made and delivered their award they become *functus officio* and their power is at an end. After having fully exercised their judgment upon the facts and reached a conclusion which they have incorporated into an award, they are not at liberty at another and subsequent time to exercise a fresh judgment on the case and alter their award; and this, although the award was not acknowledged or proved as required by § 2372. *Flannery v. Sahagian*, 134 N. Y. 87; *Herbst v. Hagenacrs*, 137 N. Y. 292. Where a contractor furnishing material and doing work upon buildings agrees to submit matters in dispute with the owner to an arbitration, such submission and arbitration is a waiver by the contractor of his right to file a mechanic's lien for money due under the contract. *N. Y. Lumber Co. v. Schneider*, 15 Civ. Pro. 35. There is a difference between common-law arbitrations and arbitrations under this title of the Code, and in common-law arbitrations certain requirements of the statutory arbitration do not apply,—for instance the requirements of § 2372 in reference to the filing or delivery of the award. *N. Y. Lumber Co. v. Schneider*, 15 Civ. Pro. 34. As to when submission to arbitration, although in writing, is not governed by this title, see *Van Beuren v. Wotherspoon*, 12 App. Div. 427. If the arbitration is a common-law arbitration the court cannot set aside an award therein authorized otherwise than by action. In common-law arbitrations the provisions of the Code (§ 2374) as to motions in respect to the award do not apply, and if any injustice has been suffered upon the part of the moving party, such injustice must be redressed by action. *In re Dicarlo*, 13 Supp. 83.

ARTICLE II.

 WHAT CONTROVERSIES CAN BE SUBMITTED TO ARBITRATION
 AND IN WHAT MANNER. §§ 2365, 2366, 2367.

SUB. 1. WHO MAY ARBITRATE AND WHAT SUBJECT-MATTER. §§ 2365, 2366.

2. THE SUBMISSION.

3. THE ARBITRATORS. § 2367.

4. EFFECT OF AGREEMENT TO ARBITRATE.

 Art. 2. What Controversies Can be Submitted to Arbitration.

SUB. 1. WHO MAY ARBITRATE AND WHAT SUBJECT-MATTER.

§§ 2365, 2366.

§ 2365. When submission to arbitration cannot be made.

A submission of a controversy to arbitration cannot be made, either as prescribed in this title or otherwise, in either of the following cases :

1. Where one of the parties to the controversy is an infant, or a person incompetent to manage his affairs, by reason of lunacy, idiocy, or habitual drunkenness.
2. Where the controversy arises respecting a claim to an estate in real property in fee or for life.

But where a person, capable of entering into a submission, has knowingly entered into the same with a person incapable of so doing, as prescribed in subdivision first of this section, the objection on the ground of incapacity can be taken only in behalf of the person so incapacitated. And the second subdivision of this section does not prevent the submission of a claim to an estate for years, or other interest for a term of years, or for one year or less, in real property ; or of a controversy respecting the partition of real property between joint tenants or tenants in common ; or of a controversy respecting the boundaries of lands, or the admeasurement of dower.

2 R. S. 641, §§ 1 and 2 (2 Edm. 560).

§ 2366. What controversies may be submitted, and how.

Except as otherwise prescribed in the last section, two or more persons may, by an instrument in writing, duly acknowledged or proved, and certified, in like manner as a deed to be recorded, submit to the arbitration of one or more arbitrators, any controversy, existing between them at the time of the submission, which might be the subject of an action. They may, in the submission, agree that a judgment of a court of record, specified in the instrument, shall be rendered upon the award, made pursuant to the submission. If the Supreme Court is thus specified, the submission may also specify the county in which the judgment shall be entered. If it does not the judgment may be entered in any county.

The general principle is that where there is power to contract with a liability to pay, there is power to arbitrate. This includes a married woman, a corporation, and a guardian on behalf of a ward. *Weed v. Ellis*, 3 Caines, 253 ; *Brady v. Mayor of Brooklyn*, 1 Barb. 584 ; *Palmer v. Davis*, 28 N. Y. 242. See *Jones v. Phoenix Bank*, 4 Seld. 228. In order to make the decisions of a majority of the arbitrators binding upon a question submitted to them under § 2366, the submission must be in writing, acknowledged, proved, or certified as a deed is required to be for the purpose of being recorded ; upon any other submission the whole number of arbitrators must agree according to the common-law rule ; the section, however, **only** applies to submissions made under this title. *Lorenzo v. Deery*, 26 Hun, 447. A liberal construction will be given to the submission and award of arbitrators, so as to uphold the award when not attacked for corruption or misconduct of the arbitrators. *Curtis v. Gokcy*, 68 N. Y. 300. An agent entering into a submission in his own name is personally bound by the award. *Smith v. Van Ostrand*, 5 Hill, 489. But the principal

Art. 2. What Controversies Can be Submitted to Arbitration.

may ratify the act of his agent, and thus become bound by the award. *Lowenstein v. McIntosh*, 37 Barb. 251; *Smith v. Sweeney*, 35 N. Y. 291. Where a submission is made by an attorney, if the parties appear and proceed before the arbitrators, they cannot object that the submission was unauthorized. *Diedrick v. Richley*, 2 Hill, 271; *Hays v. Hays*, 23 Wend. 363; see *Tillon v. U. S. L. Ins. Co.*, 8 Daly, 84. But in *McPherson v. Cox*, 86 N. Y. 472, the rule was held, Danforth, J., writing the opinion, and all concurring, except Earl, J., not voting, that an attorney at law cannot bind his client by a submission to arbitration, and that an agent would not have this power, unless especially authorized by his principal. A board of supervisors may submit a claim to arbitration. *People v. Supervisors*, 24 Hun, 413. And the assent of a corporation to arbitration may be assumed from circumstances, as that all the trustees attended before the arbitrators. *Isaacs v. Beth Hamedrash Society*, 1 Hilt. 469; appeal dismissed, 19 N. Y. 584. Executors and administrators have the right to submit to arbitrators disputed claims or demands against the estate they represent; they come within the statute. *Russell v. Lane*, 1 Barb. 519; *Wood v. Tunnicliff*, 74 N. Y. 38. Partners who sign, or assent, are bound; those who do not sign are not bound. *McBride v. Hagan*, 1 Wend. 326; *Harrington v. Higham*, 15 Barb. 524; *Harrington v. Higham*, 13 id. 660. The fact that a party is under arrest at time of submission is not such duress as to avoid his agreement to arbitrate. *Shepard v. Watrous*, 3 Caines, 166.

The statute is not intended to authorize the submission of matters arising after the agreement. *Matter of Vanderveer*, 4 Denio, 249. The provision forbidding the submissions of claims in fee or for life to real estate forbids only the submission of controversies relating to the legal title in lands; a claim to an equitable estate in lands may be submitted. *Olcott v. Wood*, 14 N. Y. 32, affirming 15 Barb. 644. But a submission to arbitration of a claim to freehold estate is absolutely void and incapable of ratification. *Wiles v. Peck*, 26 N. Y. 42. A question of boundary may be submitted or a claim for a term of years. *Cox v. Jagger*, 2 Cow. 638; *Robertson v. McNeil*, 12 Wend. 578; *Sloat v. Woodward*, 5 Hun, 340, affirmed, 71 N. Y. 590. Disputes between partners relative to the partnership property or business may be submitted. *Backer v. Fobes*, 20 N. Y. 204. An agreement by which the members of an association agree to confer judicial

 Art. 2. What Controversies Can be Submitted to Arbitration.

powers on a body of men as to all controversies which may arise is void, and the courts will not aid in enforcing the judgment of a tribunal sought to be created by private compact, except in case of submission of specific matters in controversy. *Austin v. Scaring*, 16 N. Y. 112 ; see 50 id. 250, *supra*. The question as to whether or not real estate belonging to a religious corporation shall be sold cannot be submitted to arbitration, and it is held by the same authority that the questions as to who are the legally elected trustees of a corporation cannot be so submitted. *Wyatt v. Benson*, 23 Barb. 327. A cause of action to set aside a conveyance and establish a lien on the land cannot be submitted to arbitration, it involves an estate in fee. *Keep v. Keep*, 17 Hun, 152. A submission of the question as to how much should be paid for the use of land for a highway was held valid. *Mitchell v. Bush*, 7 Cow. 185. A submission to arbitration of a dispute as to the line between two lots of land may be made by parol. *Ryder v. Dodge*, 14 Week. Dig. 84.

SUB. 2. THE SUBMISSION.

At common law the submission might be by parol. *Valentine v. Valentine*, 2 Barb. Ch. 430; *Diedrick v. Richley*, 2 Hill, 271, and cases *supra*. But an executory agreement under seal cannot be discharged by a parol arbitration. *French v. New*, 28 N. Y. 147. It is not important what form the submission takes. It is sufficient if it clearly shows intent to arbitrate and abide by the award, but it should be so drawn that the arbitrators acquire jurisdiction. The powers conferred must be strictly followed. *Pratt v. Hackett*, 6 Johns. 14; *McBride v. Hagan*, 1 Wend. 326; *Butler v. Mayor, etc.*, 7 Hill, 329; *Howard v. Sexton*, 4 Comst. 157. It may be by mutual bonds so drawn as to show the intention of the parties. *Isaacs v. Beth Hamedrash Society*, 1 Hilt. 469; *Brady v. Mayor of Brooklyn*, 1 Barb. 584. It is not necessary that there should be an express agreement to abide by the award, the submission implies such an agreement. *Valentine v. Valentine*, 2 Barb. Ch. 430; *Efuer v. Shaw*, 2 Wend. 567. It was held, in *French v. New*, 20 Barb. 486, that where a submission was made omitting to authorize judgment to be entered on the award, that it was not a submission under the statute ; this case was reversed, 28 N. Y. 147 ; and *Howard v. Sexton*, 4 Comst. 157, expressly holds a submission valid notwithstanding that it does not

 Art. 2. What Controversies Can be Submitted to Arbitration.

contain an agreement that a judgment of a court of record may be entered on the award. If the submission is under the statute, if the parties intend to authorize the arbitrators to award the cost and expenses of the arbitration, the submission should contain such authority in express terms. *Matter of Vanderveer*, 4 Denio, 249; *People v. Newell*, 13 Barb. 86, reversed, 3 Seld. 1. But if the subject of the award is a pending action, they may determine as to the costs of that suit, and also may award as to fees and expenses of arbitrators. *Matter of Vanderveer*, 4 Denio, 249. Where the submission is of all demands it includes all actions relating and demands which were in existence at the time of the submission. *Selleck v. Adams*, 15 Johns. 197; *Fiedler v. Cooper*, 19 Wend. 285; *Owen v. Bocrum*, 23 Barb. 187; *Byers v. Van Deusen*, 5 Wend. 268; *Wheeler v. Van Houten*, 12 Johns. 311. Parol evidence is not admissible to show that any matter was not intended to be submitted. *De Long v. Stanton*, 9 Johns. 38; *Efner v. Shaw*, 2 Wend. 567. Where the submission was by two parties on one side, and one on the other, it was held it included not only the joint demands of the two, but their individual demands against the other party. *Fiedler v. Cooper*, 19 Wend. 285. See *Dater v. Wellington*, 1 Hill, 319. A submission specifying particular questions and adding "divers and other matters," is deemed equivalent to a general submission of all questions. *Munro v. Alaire*, 2 Caines, 320. Uncertainty as to what is submitted is cured by reference to an instrument attached to the submission and referred to in it. *Winship v. Jewett*, 1 Barb. Ch. 173. A clause submitting "all questions between the parties connected with said partnership" includes everything necessary to a settlement of its affairs, though there is also an enumeration of special matters. *Locke v. Filcy*, 14 Hun, 139. The submission of a controversy to arbitration is not an action, and is not within the scope of the authority of an attorney, and that authority must be shown in order to bind the client by the award made. *Stiner-ville & Co. v. White*, 25 Misc. 314.

Form of Submission.

In the Matter of the Arbitration between Alexander Palmer and John Constable.	}
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WHEREAS, Differences do now and for a long time have existed be-

 Art. 2. What Controversies Can be Submitted to Arbitration.

tween Alexander Palmer and John Constable, both of the city of Albany, in relation to divers subjects of controversy and dispute, and which might respectively be the subjects of an action :

Now, therefore, the undersigned, said Alexander Palmer and John Constable, do hereby mutually covenant and agree to and with each other to submit all and all manner of actions, cause, and causes of action, suits, controversies, claims, and demands whatsoever now pending, existing, or held by and between the said parties, to John V. V. Kenyon, George Keeler, and John G. Gray, as arbitrators, who, or any two of them, shall arbitrate, award, order, judge, and determine of and concerning the same.

The said arbitrators may select or appoint an additional arbitrator or umpire, by appointment in writing. And we do mutually covenant and agree to and with each other that the said award to be made by the said arbitrators, or any two of them, shall, in all things, by us and each of us, be well and faithfully kept and observed ; provided, however, that the said award shall be made in writing under the hands of the said arbitrators, or any two of them, and duly acknowledged or proved and certified, as required by law, and filed in the county clerk's office of Albany County, or delivered to the said parties in difference, or either of them, or his attorney, on the 12th day of December, 1886.

And we further agree that a judgment of a court of record, to wit, the Supreme Court in the county of Albany, shall be rendered upon the award made pursuant to this submission, as provided by section 2366 of the Code of Civil Procedure.

Witness our hands, this 15th day of November, 1886.

(Witnessed and acknowledged.)

(Signatures.)

Submission. (134 N. Y. 88.)

WHEREAS, Patrick J. Flannery, of the city of Yonkers, county of Westchester, and State of New York, claims that Aslan Sahagian is indebted to him for work, labor, and services performed and materials furnished to the amount and in the manner set forth in the annexed bill, marked "A" ; and

WHEREAS, the said Aslan Sahagian disputes the validity of said claim and alleges that he has sustained damages in consequence of the negligence and unskilful manner in which the said work was performed.

Now, therefore, we, Patrick J. Flannery and Aslan Sahagian, aforesaid, do hereby mutually covenant and agree to and with each other that Evert K. Baldwin, James W. Prendergast, Frederick Durand, and John C. Campbell, Jr., (and in case they cannot agree then that a fifth man to be named by the said [insert names of arbitrators] in writing) shall arbitrate, award, adjudge, and determine of and concerning all manner of claims, damages, and controversies whatsoever arising out of said suit or now pending, existing or held by and between us, the said parties. And we do further mutually agree to and with each other that the award to be made by the arbitrators shall in all things by us and each of us, and by our respective heirs,

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executors, administrators, and assigns, be well and faithfully kept and observed, provided that said award be made in writing and signed by the said arbitrators, and ready to be delivered to the said parties in difference, or such of them as shall desire the same, on or before the 4th day of January next ensuing the date hereof.

And it is further mutually agreed by and between the parties aforesaid that judgment in the Supreme Court of the State of New York shall be rendered upon the award to be made pursuant to this submission.

Witness our hands and seals this

day of December, 1889.
PATRICK J. FLANNERY.
ASLAN SAHAGIAN.

(Add acknowledgment.)

Precedent for Arbitration Bond.

Know all men by these presents, that I, Alexander Palmer, of the town of Rosendale, county of Ulster, N. Y., am held and firmly bound unto John Constable, of the town of Wawarsing, said county, in the sum of \$500, lawful money of the United States of America, to be paid the said John Constable, his executors, administrators, or assigns, for which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators firmly by these presents. Sealed with my seal and dated the 20th day of November, 1886.

The condition of this obligation is such, that if the above-bounden Alexander Palmer shall well and truly submit to the decision of John V. V. Kenyon, John G. Gray, and George B. Keeler, named, selected, and chosen arbitrators, as well by and on the part of the said Alexander Palmer as of the said John Constable, between whom the controversy exists, to hear all the proofs and allegations of the parties of and concerning any and all matters relating thereto. But before proceeding to take any testimony therein the said arbitrators shall be sworn "faithfully and fairly to hear and examine the matters in controversy between the parties to these presents, and to make a just award according to the best of their ability and understanding," so as the award of the said arbitrators, be made in writing, subscribed by them, or any two of them, and attested by a subscribing witness, ready to be delivered to the said parties on or before the 10th day of March, 1887, then the above obligation to be void.

And it is hereby mutually agreed by and between the parties to these presents, that judgment shall be entered upon the award which may be made pursuant to the submission, in the Supreme Court, to the end that all matters in controversy in that behalf between the said parties shall be finally settled and concluded, pursuant to the provisions of the statute for determining controversies by arbitration.

(Add acknowledgment.)

(Signatures.) [L. s.]

SUB. 3. THE ARBITRATORS. § 2367.

§ 2367. Appointment of additional arbitrator, or umpire.

Where a submission is made as prescribed in this title, an additional arbitrator or an umpire cannot be selected or appointed, unless the submission expressly so provides. Where a submission made either as prescribed in this title or otherwise, provides that two or more arbitrators, therein designated, may select or appoint a

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person as an additional arbitrator or as an umpire, the selection or appointment must be in writing. An additional arbitrator or umpire must sit with the original arbitrators upon the hearing. If testimony has been taken before his selection or appointment, the matter must be reheard, unless a rehearing is waived in the submission, or by the subsequent written consent of the parties, or their attorneys.

The umpire may be appointed immediately by the arbitrators without waiting until the disagreement has arisen between them. *Butler v. Mayor*, 1 Hill, 489; *Mayor v. Butler*, 1 Barb. 325; *Van Cortlandt v. Underhill*, 17 Johns. 405; *McKinstry v. Solomons*, 2 id. 56, 13 id. 26. The appointment should be in writing. *Elmendorf v. Harris*, 23 Wend. 628. In case the additional person acts with the arbitrators to hear and determine the matters in controversy (as is now provided by statute, *supra*), the proceedings are henceforth to be conducted the same in all respects as if he had been appointed in the first instance with the other arbitrators. *Lyon v. Blossom*, 4 Duer, 318. The failure of the umpire to take the oath does not render the award void, but it may be waived. In case there is no waiver the Supreme Court may set aside the award on application, and an action on the award setting up the irregularity is in the nature of an application to the equitable power of the court and is sufficient to present the question. Where, by the terms of a submission, two arbitrators are appointed, with authority, in case of a disagreement, to appoint a third, the decision of any two of them to be final in case of such disagreement and appointment, a rehearing is necessary, and unless this right is expressly and unequivocally waived, a decision and award, without a rehearing, upon notice to the losing party at the time appointed therefor, is not binding and cannot be enforced. *Day v. Hammond*, 57 N. Y. 479, and cases cited under § 2366. In *Matter of Martin*, 1 How. (N. S.) 28, it is held that an agreement in writing between the parties waiving the oath of arbitrators and of the umpire is to be construed with the submission, and to supply the omission from the submission of any provision for the appointment of an umpire; and the rule in *Brown v. Lyddy*, 11 Hun, 451, that a waiver of the right to adduce evidence before the arbitrators is not a waiver of the right to do so before the umpire, if the appointment of an umpire be thought necessary, is applied. The umpire, when called upon to act, is in general invested with the same power as the arbitrators and bound by the same rules and has to perform the same duties.

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The requirements of § 2367 that the additional arbitrator must sit with the original arbitrators, and that if testimony has been taken before his selection, the matter must be reheard unless such hearing is waived, applies only to arbitrators under the statute and not to common-law arbitrators. Thus where the agreement was that a matter should be submitted to arbitrators "together with a third person to be appointed by them if necessary," and where the third person was selected by the arbitrators under the assumption that he should not act unless they should disagree, and the additional arbitrator in no way took part in the arbitration, it was held that he was only an umpire and that the arbitrators were not deprived of authority to act without him. *Enright v. Montauk Fire Insurance Co.*, 15 Supp. 894, 40 St. Rep. 642. If an agreement for arbitration authorizes the selection of an umpire upon a contingency, but the method by which he is to be chosen is not prescribed, the statute should be followed which requires the appointment to be in writing, and the umpire must sit with the original arbitrators upon the hearing, and if testimony has been taken before his appointment the matter must be reheard, unless the rehearing is waived. As to the time when the umpire must be appointed, there is no statutory provision and no general rule can be laid down, for the agreement usually controls the question. The submission provided that if the arbitrators failed to make an award before a certain day, the matter should be submitted before the umpire then or thereafter to be appointed. After taking testimony the arbitrators chose an umpire, but it did not appear that the umpire sat with the arbitrators or heard the testimony; *held*, that the award without hearing the case anew was invalid. If two arbitrators, unable to agree, exercise a power under the agreement to appoint a third, the authority to make an award is vested in them jointly, but even if an award made by the two is valid (see § 2371), it must appear to have been the result of the joint deliberation of all. He has the same powers as the arbitrators and is bound by the same rules and is required to perform the same duties. *Matter of Grening*, 74 Hun, 63, 26 Supp. 117, 56 St. Rep. 198. See this case for a discussion of the rules governing the appointment of an umpire. The parties may select whomsoever they choose as arbitrators, although if a person be selected who is objectionable for any cause, the court will relieve the party in case he acts promptly so soon as he

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becomes aware of the incompetency. *Mayor, etc., v. Butler*, 1 Barb. 336; *Perry v. Moore*, 1 E. D. Smith, 32. The appointment should be in writing if the submission is under the statute. *Elmendorf v. Harris*, 23 Wend. 628. But in a common-law arbitration an umpire may be appointed by parol. *Elmendorf v. Harris*, 5 Wend. 516.

SUB. 4. EFFECT OF AGREEMENT TO ARBITRATE.

A submission to arbitration of a pending action and of "all other actions," and of "all other matters in controversy," is a general submission of all questions. *Jones v. Wellwood*, 71 N. Y. 208. The effect of a submission to arbitration of a pending suit is so fully set forth in the following decision that an extract and citations are given as showing the rule in that respect. It is said, in *McNulty v. Solly*, 95 N. Y. 244: "The rule is well settled that mere submission to arbitration is a discontinuance of the suit. (*Camp v. Root*, 18 Johns. 22; *Ex parte Wright*, 6 Cow. 399; *Smith v. Barse*, 2 Hill, 387; *Bank of Monroe v. Widner*, 11 Paige, 529, 533; *Resseguie v. Brownson*, 4 Barb. 541; *Wilson v. Williams*, 66 id. 209; *People v. Onondaga Common Pleas*, 1 Wend. 314.) In *Larkin v. Robbins*, 2 Wend. 505, it was held that this was so, although the arbitrators had not taken or consented to take upon themselves the burden of the submission, or done any act under it. It is sufficient, says Marcy, J., 'that the parties have selected these arbitrators, and concluded their agreement to submit to them. It is this agreement which withdraws the cause from the court and effects a discontinuance of the suit.' The submission is *co acto*, a discontinuance (*Resseguie v. Brownson, supra*); and such would be its effect although it had been immediately revoked. (*Smith v. Barse, supra*.) The ground upon which the doctrine rests is that the parties have selected another tribunal—one of their own creation—to settle the controversy, and they thereby agree to and do withdraw the cause from the court. In *Buel v. Dewey*, 22 How. Pr. 342, the rule is said to apply, although the arbitrators fail or refuse to take upon themselves the duty of the submission. There is no injustice in this rule. It was in the power of the parties either to ascertain beforehand whether the persons named would accept the office of arbitrators, or to so qualify their agreement as to make it conditional on their acceptance, or that proceedings in the suit should

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only be stayed until an award is made, or no longer than a specified time, and then cease to be of effect unless an award was made. But neither of these things was done, and we think the general law was properly applied by the court below, and that the defendant was entitled to the relief sought by motion. (*Wells v. Lain*, 15 Wend. 99; *Coleman v. Wade*, 2 Seld. 44.) Cases are cited by the learned counsel for the appellant from the courts of other States (*Elliott v. Quimby*, 13 N. H. 183; *Chapman v. Seccomb*, 36 Me. 103), to the effect that the assent of the arbitrators is a condition precedent to the taking effect of the agreement for submission. But in this State the rule to the contrary seems to be too firmly established to be disturbed; and when the submission, as in this case, is the voluntary act of the parties, in words chosen by themselves, the court is not at liberty to add anything which requires their consent, or to look beyond the paper to discover their intent. The legal effect of the contract, as we have seen, was to discontinue the action and put it out of court, and to that the parties must be deemed to have assented. This result follows, although the submission was not acknowledged or certified, as prescribed by § 2366 of the Code. Its validity does not depend upon the provisions of the statute, but upon the common law, and § 2386 expressly provides that, except in certain cases, of which this is not one, the title of the Code concerning arbitrations does not affect a submission made otherwise than as prescribed therein, or any proceedings taken pursuant thereto." To the same effect is *Larkin v. Robbins*, 2 Wend. 505; *Wells v. Lain*, 15 id. 99; *Grosvenor v. Hunt*, 11 How. 355; *Baldwin v. Barrett*, 4 Hun, 119; *Van Slyke v. Lettice*, 6 Hill, 610; *Blunt v. Whitney*, 3 Sandf. 4. This is true even though the award is void. *Jordan v. Hyatt*, 3 Barb. 275; *Kee v. Kee*, 17 Hun, 152. Where there was provision for a stay, that was operative till an award was made which acted as a discontinuance. *Jacoby v. Johnston*, 1 Hun, 242. A stipulation to refer an action not referable is not an arbitration. *Ex parte Wright*, 6 Cow. 399; *Harris v. Bradshaw*, 18 Johns. 26. Agreements to submit a pending controversy were, under the circumstances, held arbitrations in *Dodge v. Waterbury*, 8 Cow. 136; *Merritt v. Thompson*, 27 N. Y. 225. An agreement to arbitrate not carried out does not bar a suit on the cause intended to be submitted. *Haggart v. Morgan*, 4 Sandf. 198, affirmed, 6 N. Y. 422; *Buel v. Dewey*, 22 How. 342.

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Rights and duties of parties.—A submission of a dispute arising on a building contract, though not conforming to the mode prescribed by the contract, is sufficient to bind the parties by the award. The appearance by one of the parties as a witness is sufficient to show he assented to the submission. *White v. Mathews*, 14 Week. Dig. 67.

Under an arbitration clause in a policy of insurance, it is the duty of the parties to the contract to act in good faith to accomplish the appraisal in the way provided; and if either acts in bad faith, so as to defeat the real object of the clause, the other is absolved from compliance therewith, and so when one arbitration fails, from default of one of the parties, the other is not bound to enter into a new arbitration agreement. *Ulrig v. Williamsburg City Fire Insurance Company*, 101 N. Y. 362. A party to a building contract may waive a stipulation therein that the final payment to be made by him shall not be required unless the architect shall certify that the contract has been fully performed to his satisfaction; an acceptance of the building as under a completed contract is such a waiver and entitles the contractor to recover the sum due, although no certificate has been given, and although the architect is not satisfied. *Smith v. Alker*, 102 N. Y. 87. Under a provision in a building contract, that should any dispute arise respecting the true construction or meaning of the drawings or specifications, the same shall be decided by an arbitrator named, and his decision shall be final and conclusive, notice of submission to the arbitrator by one party need not be given to the other when no dispute as to items or values is to be determined, but merely the construction of the specifications. *Gustafson v. McGay*, 12 Daly, 423, citing *McMahon v. N. Y. & E. R. R. Co.*, 20 N. Y. 463. But where, after submission to arbitrators, they disagree, and an umpire is chosen, the parties are entitled to notice and opportunity to be heard before the umpire and his associates, and an award made without such notice is invalid. *Linde v. Republic Fire Ins. Co.*, 50 N. Y. Super. 362. On dismissal of an action to enjoin two arbitrators chosen by a landlord and tenant, pursuant to a covenant in a lease to renew the same at a rent to be fixed by the arbitrators, from appointing an umpire as provided in the lease, it was held that it is not the province of a court of equity to direct arbitrators how they shall decide a case pending before them. *Livingston v. Sage*, 95 N. Y.

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289. When a fire insurance policy provided that **in case of loss and failure of the parties to agree on the amount of damage**, the question should be referred to two appraisers, one selected by each party, and if they disagreed, they should choose an umpire, and the award of any two should be binding, and the appraisers disagreed, it was held that a determination of the amount of damage by arbitration, as provided, was a condition precedent, and that it was the duty of the insured to offer to select new appraisers before he could maintain an action on the policy. *Davenport v. Long Island Ins. Co.*, 15 Week. Dig. 62. Where an arbitrator determines the questions submitted to him without hearing a party or appointing a time for a hearing, the decision is not binding on the party, and he may prove his claim anew. *Moran v. Bogert*, 16 Abb. (N. S.) 303.

ARTICLE III.

POWERS AND DUTIES OF ARBITRATORS. §§ 2368, 2369, 2370, 2371, 2372.

§ 2368. Time for hearing; adjournment, etc.

Subject to the terms of the submission, if any are specified therein the arbitrators, selected as prescribed in this title, must appoint a time and place for the hearing of the matters submitted to them; and must cause notice thereof to be given to each of the parties. They, or a majority of them, may adjourn the hearing from time to time, upon the application of either party, for good cause shown, or upon their own motion; but not beyond the day fixed in the submission for rendering their award, unless the time so fixed is extended by the written consent of the parties to the submission, or their attorneys.

2 R. S. 541, § 3.

§ 2369. Arbitrators to be sworn.

Before hearing any testimony, arbitrators selected either as prescribed in this title, or otherwise, must be sworn, by an officer designated in § 842 of this act, faithfully and fairly to hear and examine the matters in controversy, and to make a just award, according to the best of their understanding; unless the oath is waived, by the written consent of the parties to the submission or their attorneys.

Id. § 4, and part of § 5.

§ 2370. Attendance of witnesses, etc.

The arbitrators, selected either as prescribed in this title, or otherwise, or a majority of them, may require any person to attend before them as a witness; and they have, and each of them has, the same powers, with respect to all the proceedings before them, which are conferred, by the provisions of title second of chapter ninth of this act, upon a board, or a member of a board, authorized by law to hear testimony.

Id. § 6, and part of § 5.

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§ 2371. All the arbitrators to meet; when majority may award. Fees.

All the arbitrators, selected as prescribed in this title, must meet together, and hear all the allegations and proofs of the parties; but an award by a majority of them is valid, unless the concurrence of all is expressly required in the submission. Unless it is otherwise expressly provided in the submission, the award may require the payment, by either party, of the arbitrators' fees, not exceeding the fees allowed to a like number of referees in the Supreme Court; and also their expenses.

2 R. S. 541, § 7.

§ 2372. Award; to be authenticated, etc.

To entitle the award to be enforced, as prescribed in this title, it must be in writing and, within the time limited in the submission, if any, subscribed by the arbitrators making it; acknowledged or proved, and certified in like manner, as a deed to be recorded; and either filed in the office of the clerk of the court, in which, by the submission, judgment is authorized to be entered upon the award, or delivered to one of the parties, or his attorney.

The arbitrators may fix the time and place of hearing, but the parties must have an opportunity to be heard, unless the stipulation provides to the contrary. *Morcwood v. Jewett*, 2 Robt. 496. An award, made without notice to a party of the hearing, is void. *Jordan v. Hyatt*, 3 Barb. 275; *Moran v. Bogert*, 3 Hun, 603; *Knowlton v. Mickles*, 29 Barb. 465; *Peters v. Newkirk*, 6 Cow. 103. The party seeking to impeach the award must show lack of notice. *Mayor v. Butler*, 1 Barb. 325. Under the Revised Statutes the provisions regulating the mode of procedure were held to apply not only where the written submission contained an agreement that judgment might be entered, but generally to all written submissions. *Bulson v. Lohnes*, 29 N. Y. 291. But reference must be had to § 2386 in this connection, which has since been enacted; a similar enactment, however, existed in the statute. The notice of hearing and the production of evidence may be waived by the parties, and this waiver may be gathered from the circumstances of the case. It is no objection to the award of an arbitrator that he did not hear the parties or take their evidence when it appears that they waived a hearing, and that it was intended the arbitrator should decide the matter submitted upon his personal knowledge and inspection. *Wilberly v. Matthews*, 11 Week. Dig. 471, affirmed, 91 N. Y. 648. It is a good defence to an action upon an award to show that the arbitrators proceeded without notice to the defendant, and that they made the award in suit before defendant closed his proofs. *Garvey v. Carey*, 35 How. 282. The arbitrators must take the usual means to ascertain values, and the parties are entitled to

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be heard and produce witnesses unless the privilege is waived. They are entitled to notice of appointment of an umpire, and an opportunity to be heard by him, and a waiver of this privilege as to the original two does not extend to the umpire. *Brown v. Lyddy*, 11 Hun, 451. And submission which provides that the party found indebted should pay by a certain day, implies a limitation that the award must be made by that day, and subsequent proceedings are void unless the time is extended in writing. *People v. Townsend*, 5 How. 315. But the time for making an award under a sealed submission at common law may be extended by parol, and if the parties proceed without objection, after time has expired, they will be deemed to have waived the stipulation as to time. *Wood v. Tunnickliff*, 74 N. Y. 38.

Precedent for Appointment of Time and Place of Hearing, and Notice to Parties.

Alexander Constable

and

John Palmer.

} In Arbitration.

To ALEXANDER CONSTABLE and JOHN PALMER :

You are hereby notified that the undersigned, arbitrators appointed pursuant to an agreement between you, dated the 20th day of November, 1886, hereby appoint the 1st day of December, 1886, at ten o'clock in the forenoon, as the time, and the office of J. W. Bentley, in the city of Albany, as the place for the hearing of the matters so submitted to them, and that they will attend at such time and place for the purpose of such hearing.

Dated November 21, 1886.

Yours, etc.,

JOHN V. V. KENYON,
JOHN G. GREY,
GEORGE G. KEELER,
Arbitrators.

Form of Notice.

In the Matter of the Arbitration between Alexander Palmer and John Constable.

SIR—Take notice that the above matter will be brought to a hearing before the arbitrators appointed therein, at the office of James W. Bentley, in the city of Albany, on the first day of Decem-

 Art. 3. Powers and Duties of Arbitrators.

ber, 1886, at 10 o'clock in the forenoon, pursuant to an order made by them, fixing such time and place for said hearing.

ALEXANDER PALMER.

To JOHN CONSTABLE.

Arbitrators before taking testimony must make the required oath, unless the same is waived by the written consent of the parties. *Matter of Grening*, 74 Hun, 65, 26 Supp. 117, 56 St. Rep. 198. The award of arbitrators is invalid unless they take the oath prescribed by this section before hearing testimony, and it seems that to establish a waiver of such oath, the written consent of the parties or their attorneys is required. *Flannery v. Sahagian*, 134 N. Y. 89. Although it was held formerly that the omission to take the oath did not invalidate the proceedings, whether under the statute or at common law. *Browning v. Wheeler*, 24 Wend. 258; *Howard v. Sexton*, 4 Comst. 157; *Winship v. Jewett*, 1 Barb. Ch. 173. But it is an irregularity, and if not waived may be taken advantage of to set aside the award. *Day v. Hammond*, 57 N. Y. 479. It is a waiver if both parties are present and proceed to trial without a request to have the arbitrators sworn. *Kelsey v. Darrow*, 22 Hun, 125; *Cutler v. Cutler*, 48 N. Y. Super. 470.

Form of Oath.

You and each of you do swear that you will faithfully and fairly hear and examine the matters in controversy submitted to you, as arbitrators, by and between Alexander Palmer, on the one part, and John Constable, of the other part, and a just award thereon make according to the best of your understanding.

Under the Revised Statutes it was held two had power to hear and act in case all three were notified, and one refused to act. *Crofoot v. Allen*, 2 Wend. 494. But see language of the section where all heard the proofs, as to who may decide. *Shultz v. Halscy*, 3 Sandf. 405. And it might be shown *aliunde* the record that all heard the proofs. *Oakley v. Finch*, 7 Cow. 290. It is not necessary all should concur in the decision of every question which arises. *Campbell v. Western*, 3 Paige, 124. It is no ground for setting aside award that arbitrators have received incompetent evidence. *Viele v. Troy & Boston R. R. Co.*, 21 Barb. 382. If one of the parties to an arbitration refuses to appoint an arbitrator, the arbitrator appointed by the other party cannot

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act. *Holliday v. Marshall*, 7 Johns. 211. A submission provided that the decision of a "majority" should be binding, and the bond provided for decision "by said arbitrators;" *held*, an award by two was valid. *Isaacs v. Beth Hamedrash Society*, 1 Hilt. 469. On a submission to two who were to choose a third, if they could not agree, which they did, an award signed by two only is valid. *Battcy v. Button*, 13 Johns. 186. On this general subject, see *Matter of Grening*, 74 Hun, 63, 26 Supp. 117, 56 St. Rep. 198, *ante*. An award signed by three, as to only two of whom there was a subscribing witness, *held*, good. *Ott v. Schroepfel*, 4 Barb. 250; see *Jackson v. Meritt*, 11 Abb. 370; *Schulz v. Halsey*, 3 Sandf. 405; *Haff v. Blossom*, 5 Bosw. 559; *Whitlock v. Duffield*, Hoff. 110, for decisions based on peculiar facts in each case. An award is in the nature of a judicial act, and void if made on Sunday. *Story v. Elliott*, 8 Cow. 27. It is not necessary that an award should show on its face that all met and heard the matters in controversy, but that may be shown by parol. *Ackley v. Finch*, 7 Cow. 290; *Schulz v. Halsey*, 3 Sandf. 405. Nor need it show on its face that the parties had notice of the hearing. *Butler v. Mayor*, 1 Barb. 325. The fact that the submission is under seal does not make it necessary that the award should be under seal. It is only necessary when the submission requires it. *Owen v. Boerum*, 23 Barb. 187. Since the passage of the Code there is no statute in force which empowers a majority of the arbitrators appointed by private persons to make a valid award, unless the submission is in writing, subscribed by the parties and duly acknowledged or proved and certified as a deed is required to be for the purpose of being recorded. *Lorenzo v. Decry*, 26 Hun, 447. If arbitrators decline to act, they are no longer arbitrators, and an award made by them is void. Parol evidence is admissible to show that before making their award they resigned, and their resignations were accepted. *Relyea v. Ramsey*, 2 Wend. 602. An award ready to be delivered on payment of fees sufficiently complies with a provision in the submission that the award must be delivered by a certain day. *Ott v. Schroepfel*, 3 Barb. 56. And delivery may be waived. *Perkins v. Wing*, 10 Johns. 143. *Burnap v. Loscy*, 1 Lans. 111; *Buck v. Wadsworth*, 1 Hill, 321. Where the arbitrators' bond requires the award to be executed ready for delivery to the parties, it requires the award to be executed in duplicate, so that each party may have one. Either

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party may waive this, and if he consents to take a copy, leaving the original with the opposite party, the award is valid though but one is executed. *Gidley v. Gidley*, 65 N. Y. 169. If arbitrators make a void award, their appointment becomes null, because, having expressed an opinion, they are no longer impartial. *Mayor v. Butler*, 1 Barb. 325. The arbitrators declared the amount due the claimant, and that he should pay their costs. Afterward they met again and made a new award, declaring the same amount to be due, but as to costs, simply stating the amount, making no direction as to payment. In an action on the second award, it was held that they had no power to make it, and that the testimony of the arbitrators was inadmissible to show that they did not intend to award costs against the claimant; the first award exhausted their powers. *Doke v. James*, 4 N. Y. 567.

Where an award is void for uncertainty, it cannot be helped by a second one that is void, because the arbitrators can make only one. *Fallon v. Kelchar*, 16 Hun, 266. The award should embrace nothing but the matters submitted; if otherwise, it is void. *Pratt v. Hachett*, 6 Johns. 14; *Butler v. Mayor*, 7 Hill, 329. But in case the portion so in excess of the submission can be separated from the rest, it may be treated as surplusage, and the award should stand as to matters submitted. *Cox v. Jagger*, 2 Cow. 638; *McBride v. Hagan*, 1 Wend. 326; *Gomez v. Garr*, 6 id. 583; *Martin v. Williams*, 13 Johns. 264; *Harrington v. Higham*, 15 Barb. 524. An award cannot acquire one not a party to do an act, if so it is void as to all, unless the unauthorized portion can be separated. *Masten v. Williams*, *supra*. Arbitrators are presumed to have acted upon all matters which were contained in the submission. *Emery v. Hitchcock*, 12 Wend. 156. But in case the award does not embrace all the matters within the submission brought before the arbitrators it is void. *Wright v. Wright*, 5 Cow. 197; *Moore v. Cockroft*, 4 Duer, 133. But it is not an objection that a particular matter contained in the submission was not laid before the arbitrators. The parties are bound to claim all they desire before the arbitrators. *Owen v. Bocrum*, 23 Barb. 188; *Ott v. Schroepfel*, 1 Seld. 486. The award settles and quiets all matters fairly within the meaning and intent of the submission. The award acts as a judgment. *Lowenstein v. McIntosh*, 37 Barb. 251. It does not invalidate an

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award because it does not dispose of certain personal property belonging to a firm, the disposition of which was submitted to arbitrators on the hearing. This was upon the ground that such disposition was not required by the submission. *Backus v. Forbes*, 20 N. Y. 204. The penalty of the bond is only regarded in case of revocation. Where the submission is revoked, in ascertaining the amount to be awarded, the arbitrators are not limited to that sum. *Ex parte Wallis*, 2 Cow. 522. It is held that a necessary incident of an arbitration is the awarding of costs. *Strang v. Ferguson*, 14 Johns. 161; *Nicholas v. Rens. Co. Mutual Ins. Co.*, 22 Wend. 125; *Cox v. Jagger*, 2 Cow. 638. And to the contrary see *Trustees of Amsterdam v. Vanderveer*, 4 Denio, 249; *People v. Newell*, 13 Barb. 86; *Akeley v. Akeley*, 17 How. 21. But if the subject of the controversy is an action then pending in court, the arbitration may award as to the costs of the action without express authority, and also as to fees and expenses of arbitrators. *Matter of Vanderveer*, 4 Denio, 251. An award in a matter submitted to arbitration while a suit was pending on an appeal from a judgment of a justice of the peace that plaintiff recover \$25 and the costs, if any recovery before such justice, gives only such costs as are then owing and unpaid. *Willey v. Shaver*, 4 Hun, 797.

Form of Award.

In the Matter of the Arbitration between Alexander Palmer and John Constable.

To all to whom these presents shall come or may concern :

We, John V. V. Kenyon, George Keeler, and John G. Gray, to whom was submitted as arbitrators, the matters in controversy existing between Alexander Palmer and John Constable, as by the condition of the submission executed by the said parties respectively, and dated the 10th day of November, 1886, more fully appears: Now, therefore, know ye, that we, the arbitrators mentioned in the said submission, having heard the proofs and allegations of the respective parties, and examined the matters in controversy, by them submitted therein, do, therefore, make this award in writing, that is to say, the said, etc. (here give findings in detail).

In witness whereof, we have hereunto subscribed these presents this 5th day of December, in the year 1886.

JOHN V. V. KENYON,
JOHN G. GRAY,
GEORGE KEELER,
Arbitrators.

(Add acknowledgment).

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Award. (134 N. Y. 88.)

To all to whom these presents shall come or may concern:

We, Evert K. Baldwin, James W. Prendergast, Frederick Durand, and John C. Campbell, Jr., to whom was submitted as arbitrators the matters in controversy existing between Aslan Sahagian and Patrick J. Flannery, as by the contents of the statements executed by the said parties respectively and dated the 30th day of December, 1889, more fully appears:

Now, therefore, know ye, that we, the arbitrators mentioned in the said submission, having heard the proofs and allegations of the respective parties and examined the matters in controversy by them submitted therein, do therefore make this award in writing, that is to say, the said Patrick J. Flannery is entitled to recover of the said Aslan Sahagian the final payment due him on his contract, and as certified to by John Rayner, the architect, and that such payment amounts to \$1,311.41, and interest thereon for seven months, amounting to \$38.64, making a total of \$1,350.04.

In witness whereof, we have hereunto subscribed these presents this 30th day of December, 1889.

E. K. BALDWIN,
JAS. W. PRENDERGAST,
FREDERICK W. DURAND,
J. C. CAMPBELL, JR.,

(Add acknowledgment).

Arbitrators.

As soon as arbitrators under the Code have delivered their award, they have no power to alter the same, although the first award was not acknowledged and proved as required by this section. The failure to follow the requirements as to acknowledgment and proof of the award does not take from it the character of an award if it were executed and delivered by the arbitrators as an award, and the effect of such defective award is to prohibit them from making another award, as they have become *functus, officio*. *Flannery v. Sahagian*, 134 N. Y. 88. But where a paper signed by arbitrators is in manner and form an opinion merely, and is merely the basis of the judgment to be entered, it is not deemed to be a formal award, and its delivery to one of the parties will not deprive the arbitrator of power to make, afterwards, an award in due form. *Matter of Beach v. Sterne*, 67 Hun 341, 22 Supp. 330, 51 St. Rep. 820, affirmed, 143 N. Y. 634, 60 St. Rep. 873, 35 Supp. 413.

Judgment cannot be entered upon an award not acknowledged, proved, or certified according to the requirements of this section, and if such an award is entered, it may be set aside. *Matter of Grening*, 74 Hun, 67, 56 St. Rep. 200. The failure of arbitrators

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properly to acknowledge and prove the award as required by this section, does not rob it of its character of an award, and they cannot thereafter make a subsequent award. *Flannery v. Sahagian*, 134 N. Y. 87. But this section requiring the award to be in writing, and acknowledged, proved, or certified in a like manner as a deed to be recorded, applies only to arbitrations under the Code, and does not apply to common-law arbitrations. *N. Y. Lumber Co. v. Schneider*, 15 Civ. Pro. 32, 1 Supp. 442, affirmed, 119 N. Y. 475, 29 St. Rep. 596. Where all questions were submitted to the arbitrators and they state that they have passed upon all the proofs and allegations as submitted, there is a conclusive presumption that all questions were passed upon in the absence of conclusive proof that they were not passed upon. *N. Y. Lumber Co. v. Schneider*, 15 Civ. Pro. 32, 1 Supp. 442. When the arbitration is a common-law arbitration and the method adopted is informal, and the award is never confirmed, nor is any judgment entered thereon, such arbitration may yet be good at common law; and, if so, an award between the parties has the same force and effect as a final judgment in regard to all matters within the scope of the submission. *Burhans v. Union Free School District*, 24 App. Div. 432.

A valid award has the binding effect of a judgment as between the parties, and is a bar to a suit for the original cause of action. *Shephard v. Watson*, 3 Caines, 166; *Wheeler v. Van Houten*, 12 Johns. 311; *Fidler v. Cooper*, 19 Wend. 285; *Wells v. Lain*, 15 id. 99; *Diedrick v. Richley*, 2 Hill, 272; *Wilberly v. Matthews*, 91 N. Y. 698; *Loewenstein v. McIntosh*, 37 Barb. 251; *Coleman v. Wade*, 6 N. Y. 44. Even though the award has not been performed. *Brazill v. Isham*, 12 N. Y. 9. When the submission is general of all demands which either party has against the other, the award is a bar to any demand existing at the time of the submission. *Wheeler v. Van Houten*, 12 Johns. 311; see *Taylor v. Remington*, 51 N. Y. 663. Although the terms of a submission may be sufficiently broad to render a particular claim the proper subject of trial, yet if the award does not on its face appear to include any adjudication thereon, evidence is admissible to show that proof of such claim was not heard, but was in fact excluded by the arbitrators, and the award will not conclude the parties with respect to such claim. *Morss v. Osborn*, 64 Barb. 543. Although an award cannot operate as a conveyance of land, it is effectual

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by way of preventing a party from disputing title. *Cox v. Jagger*, 2 Cow. 638. Upon the strength of an award upon a question of boundary, the party in whose favor it is may recover in ejectment. *Robertson v. McNeil*, 12 Wend. 578; *Sellick v. Adams*, 15 Johns. 197. An award on a legatee's claim against an executor before the surrogate, held binding on the accounting. *Valentine v. Valentine*, 2 Barb. Ch. 430. An award made against the estate of a deceased person under a submission made by his personal representatives, ascertains and liquidates the claim, but gives no priority of payment over other creditors, nor does an award of payment absolutely have that effect, though it may bind the representatives personally. *Wood v. Tunnickliff*, 74 N. Y. 38. An award must be pleaded to be a defence and cannot be shown under a general denial. *Brazill v. Isham*, 12 N. Y. 9.

ARTICLE IV.

MOTION TO CONFIRM, VACATE, MODIFY, OR CORRECT AWARD.

§§ 2373, 2374, 2375, 2376, 2377.

§ 2373. Motion to confirm award.

At any time within one year after the award is made as prescribed in the last section, any party to the submission may apply to the court, specified in the submission, for an order confirming the award; and thereupon the court must grant such an order, unless the award is vacated, modified, or corrected, as prescribed in the next two sections. Notice of the motion must be served, upon the adverse party to the submission, or his attorney, as prescribed by law for service of notice of a motion upon an attorney in an action in the same court. In the Supreme Court, the motion must be made within the judicial district, embracing the county where the judgment is to be entered.

Id. remainder of § 9.

§ 2374. Id.; to vacate award.

In either of the following cases, the court, specified in the submission, must make an order vacating the award, upon the application of either party to the submission:

1. Where the award was procured by corruption, fraud, or other undue means.
2. Where there was evident partiality or corruption in the arbitrators, or either of them.
3. Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any other misbehavior, by which the rights of any party have been prejudiced.
4. Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final, and definite award, upon the subject-matter submitted, was not made.

Where an award is vacated, and the time, within which the submission requires the award to be made, has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

Id. § 10, and part of § 13.

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§ 2375. Id.; to modify or correct award.

In either of the following cases, the court, specified in the submission, must make an order modifying or correcting the award upon the application of either party to the submission :

1. Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing, or property, referred to in the award.

2. Where the arbitrators have awarded upon a matter not submitted to them, not affecting the merits of the decision upon the matters submitted.

3. Where the award is imperfect in a matter of form, not affecting the merits of the controversy, and if it had been a referee's report, the defect could have been amended or disregarded by the court.

The order may modify and correct the award, so to affect the intent thereof, and promote justice between the parties.

2 R. S. 541, §§ 11 and 13.

§ 2376. Motions; when to be made.

Notice of a motion to vacate, modify, or correct an award, must be served upon the adverse party to the submission, or his attorney, within three months after the award is filed or delivered, as prescribed by law for service of notice of a motion, upon an attorney in an action. For the purposes of the motion, any judge, who might make an order to stay the proceedings, in an action brought in the same court, may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

§ 2377. Costs on vacating award.

Where the court vacates an award, costs, not exceeding twenty-five dollars and disbursements, may be awarded to the prevailing party ; and the payment thereof may be enforced, in like manner as the payment of costs upon a motion in an action.

Form of Notice of Motion to Confirm Award.

Alexander Palmer and John Constable.	}	In arbitration.
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To JOHN CONSTABLE and CARROLL WHITAKER, Esq., his Attorney :

Take notice, that an application will be made to the Supreme Court, at a Special Term thereof, to be held at the court-house, in the city of Kingston, on the 26th day of December, 1886, for an order confirming the award of the arbitrators herein in the above-entitled matter, which award is dated December 5, 1886, and for judgment thereupon and in accordance therewith, with costs, and for such other or further relief as may be proper.

That said application will be made upon said award and upon other papers served. Yours etc.,

ALEXANDER PALMER.

S. B. SHARPE,

Attorney for ALEX. PALMER.

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Form of Order upon Motion Confirming Award.

At a Special Term held at the city hall, in the city of Albany, on the 10th day of January, 1887:

Present:—Hon. S. L. Mayham, *Justice*.

(Title.)

On reading and filing the award made by the arbitrators (naming them) in the above matter, dated the 5th day of December, 1885, by which it appears that, etc., (state substance of award) with proof of due service upon John Constable, of notice of this application, together with a copy of said award, and upon motion of S. B. Sharpe, counsel for said Alexander Palmer, after hearing Carroll Whitaker, Esq., counsel for John Constable, opposed, and on reading (name any opposing papers): It is hereby ordered that the said award be, and the same is hereby confirmed, and that the said Alexander Palmer have judgment against the said John Constable, for the relief therein specified, and for the fees and expenses of the said arbitrators, as therein mentioned, and \$25 costs of this application, and of the proceedings subsequent hereto, and his disbursements therefor to be taxed.

S. L. MAYHAM,
Justice Supreme Court.

Order Confirming Award.

(Caption.)

Patrick J. Flannery <i>agst.</i> Aslan Sahagian.
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134 N. Y. 88.

The motion to confirm the award of the arbitrators (insert names) in the above entitled matter, dated December 30, 1889, by which it appears that the above named Patrick J. Flannery is entitled to recover from the above named Aslan Sahagian the sum of \$1,354.04, and the motion to vacate said award, coming on to be heard, and on reading and filing the submission to arbitration of the parties hereto, the award made by the said arbitrators, the certificate of George Rayner, architect, the affidavits of Patrick J. Flannery verified the 6th day of February, 1890, and of the said arbitrators verified January 30th, 1890, and on motion of F. X. Donoghue, counsel for Patrick J. Flannery, after hearing Joseph F. Daly, counsel for said Aslan Sahagian, opposed, and on reading the affidavit of the said Aslan Sahagian, verified February 6th, 1890, it is hereby

Ordered, that the said award be and the same is hereby confirmed, and that the said Patrick J. Flannery have judgment against the said Aslan Sahagian for the sum of \$1,350.04, with interest thereon from December 30, 1889, and \$10 costs of this application and of the proceedings subsequent thereto and his disbursements therefor, to be taxed.

J. O. DYKMAN,
J. S. C.

 Art. 4. Motion to Confirm, Vacate, Modify, or Correct Award.

Form of Notice of Motion to Vacate or Modify, etc., the Award.

(Title.)

To S. B. SHARPE, attorney for ALEXANDER PALMER :

Take notice that an application will be made to the Supreme Court, at a Special Term thereof, to be held at the court-house, in the city of Hudson, on the 5th day of January, 1886, for an order vacating (modifying or correcting), in the following particulars : (stating them) the award of the arbitrators made herein, dated December 5, 1885, with costs, and for such other or further relief as may be proper.

That such application will be made upon the said award, and upon the affidavits and papers, with copies of which you are herewith served.

Yours, etc.,

CARROLL WHITAKER,

Attorney for JOHN CONSTABLE.
Order to Stay.
To ALEXANDER PALMER :

On the within papers, let all proceedings on the part of Alexander Palmer, to enforce the said award, be stated until the hearing and determination of the within noticed motion.

Dated, December 26, 1885.

W. L. LEARNED,

Justice Supreme Court.
Order Vacating Award.

At a term of the Supreme Court, held in and for the State of New York, at the court-house in the city of Hudson, on the 5th day of January, 1886 :

Present :—Hon. Samuel Edwards.

(Title.)

On reading and filing notice of motion, that the award made herein by the arbitrators heretofore selected, dated the 5th day of December, 1885, be vacated, modified, or corrected, and on motion of C. Whitaker, counsel for John Constable, and after hearing S. B. Sharpe, attorney for Alexander Palmer, and on reading (name opposing papers) : It is hereby ordered that the said award be, and the same is hereby vacated with \$25 costs and disbursements, to be taxed to be paid by the said Alexander Palmer to the said John Constable.

SAMUEL EDWARDS,

Justice Supreme Court.

It was held in *Hughes v. Bywater*, 4 Hill, 551, that where a bond of submission to arbitrators contained a stipulation that in case the award was not paid or fulfilled, judgment for the penalty

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of the bond might be forthwith entered in the Supreme Court; the prevailing party was at liberty to perfect judgment immediately, but this is questioned in *Goodsell v. Phillips*, 49 Barb. 353. As to the entry of judgment on an award under arbitration, not under the statute, see *Bank of Monroe v. Widner*, 11 Paige, 529; *Merritt v. Thompson*, 27 N. Y. 225. A mistake in an award may be corrected by an action in equity, notwithstanding the award was made under an arbitration providing that judgment might be entered on the award under the statute. The power of the court to correct or modify the award within a limited time is not exclusive, but the Supreme Court possesses the original equitable jurisdiction.

On application to vacate an award, the court may go behind the award and inquire as to what took place before the arbitrators. *Matter of Williams*, 4 Denio, 194; *Butler v. Mayor*, 7 Hill, 329. But the arbitrators cannot give evidence for the purpose of impeaching the award or to contradict it. *Mayor v. Butler*, 1 Barb. 325; *French v. New*, 20 id. 481; *Campbell v. Western*, 3 Paige, 124; *Harrington v. Hamblin*, 12 Wend. 212. But they may give evidence to show that they did not consider a particular matter, or that matters were contained in the award not in the submission. *Morris v. Osborn*, 64 Barb. 543; *Mayor v. Butler*, 1 id. 325; *Briggs v. Smith*, 20 id. 409.

The rule that arbitrators cannot give evidence to impeach the award does not apply where an umpire has been chosen. 1 Barb. 325, *supra*. Nor does it apply to an arbitrator who has not signed an award made by the majority of the arbitrators. *Arbitration of National Bank v. Darragh*, 17 Week. Dig. 290. Unless restricted by the submission, arbitrators may disregard strict rules of law and evidence and decide according to their sense of equity. *Fudickar v. Guardian Mutual Life Ins. Co.*, 62 N. Y. 392. Awards are to be liberally construed for the purpose of upholding them. *Jackson v. Ambler*, 14 Johns. 96; *Fudickar v. Ins. Co.*, 62 N. Y. 392.

An award may be set aside for partiality or corruption of the arbitrators. *Smith v. Cutler*, 10 Wend. 590; *Ennist v. Hoyt*, 17 id. 410. But in order to justify a court in interfering on this ground, the facts should be clearly shown. *Wood v. A. & R. R. R.*, 8 N. Y. 168; *Perkins v. Giles*, 50 id. 228. Or if the parties have not had an opportunity to be

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heard before the arbitrators. *Jordan v. Hyatt*, 3 Barb. 275. The misconduct and misbehavior which under the statute authorize vacating an award must be acts which evince unfairness, and not merely error of judgment, no matter how great. *Smith v. Cutler*, 10 Wend. 590; *Ketcham v. Woodruff*, 24 Barb. 147; *Perkins v. Giles*, 50 N. Y. 228; *De Castro v. Brett*, 56 How. 484. The court will not set aside an arbitration where the arbitrators have erred only in regard to a question of law or fact. *Jackson v. Ambler*, 14 Johns. 96; *Campbell v. Western*, 3 Paige, 124; *Winship v. Jewett*, 1 Barb. Ch. 173; *Ketcham v. Woodruff*, 24 Barb. 147; *Emmett v. Hoyt*, 17 Wend. 410. When the award is within the limit of the submission, and there is no evidence of fraud, courts will not ordinarily interfere with the determination. *Matter of Roosevelt v. Nichols*, 6 Week. Dig. 437. An award will not be set aside for error either of law or fact relating to matters within the jurisdiction of the arbitrators. There must be either misconduct, or corruption, or a mistake, or a clerical error, and in general this must appear on the face of the award, or in some paper delivered with it. *Morris Run Coal Co. v. Salt Co. of Onondaga*, 58 N. Y. 667. No objection can be made which does not involve corruption or misconduct on the part of the arbitrators, or an award not within the submission. *Merritt v. Thompson*, 27 N. Y. 325; *Herrick v. Blair*, 1 Johns. Ch. 101; *Shepard v. Merrill*, 2 id. 276; *Todd v. Barlow*, id. 551; *Perkins v. Wing*, 10 Johns. 142; *Matter of Roosevelt v. Nichols*, 6 Week. Dig. 437. It is not competent at law to show that the arbitrators made mistakes, and a voluntary promise by a party to correct any errors does not open the award in that respect. *Efner v. Shaw*, 2 Wend. 567. And it is no ground of objection in an action to enforce a common-law submission that it is against law. *Mitchell v. Bush*, 7 Cow. 185; *Cranston v. Kenny*, 9 Johns. 212. Although if a mistake is made in ascertaining the amount due it is a good defence to an action on an award, a general allegation that the arbitrators "made a mistake in such computation, which mistake was a clerical error, and that the award was the result of such clerical error," is sufficient. *Garvey v. Carey*, 35 How. 282. If special matters are submitted the award is not void because it directs a general release, since it will inure only to the matter submitted. *Munro v. Alaire*, 2 Caines, 320. Where a party has with full knowledge accepted and executed

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an award it should not be set aside. *De Castro v. Brett*, 56 How. 484. In *Fudickar v. Guardian Mutual Life Insurance Co.*, 45 How. 462, 37 N. Y. Super. 358, affirmed, 62 N. Y. 392, it is held that where all the proofs and proceedings before the arbitrator are not put in evidence in an action to set aside the award, the court will presume that the facts necessary to sustain his rulings were established before him. The general rule that the court will not interfere with an award except for fraud, corruption, partiality, or misconduct on the part of the arbitrator, or excessive or imperfect use of the powers conferred, or of gross mistake as to which there can be no controversy, is reiterated with the qualifications that the rule does not apply, where the arbitrator by statements in the award or opinion of his intention to be governed by strictly legal rules has conferred upon the court a power of inquiry and revision. See, also, *De Castro v. Brett*, 56 How. 484. In *Halstead v. Scaman*, 82 N. Y. 27, some of the rules applicable to awards are stated to be that the refusal of an arbitrator to hear testimony which is pertinent and material is sufficient misconduct to authorize the setting aside of his award, though he may think he has sufficient other evidence. The construction by arbitrators of the submission to them is not conclusive, it is for the court to determine whether they have exceeded their powers or refused to exercise them. The general rule that the decisions of arbitrators on the mere ground that they are erroneous are not reviewable, applies only to matters submitted to them. The case of *Fudickar v. The Guardian Mut. Ins. Co.*, 62 N. Y. 392, is cited with approval. That case holds, among other things, that any violation of material justice, such as receiving material evidence from one party without the knowledge or consent of the other, should be condemned. The two cases give very fully the principles now applied by the courts to the review of awards made by arbitrators, and the earlier cases of *Herrick v. Blair*, 1 Johns. Ch. 101; *Campbell v. Western*, 3 Paige, 124; *Dater v. Wellington*, 1 Hill, 319; and *Turnbull v. Martin*, 37 How. 20, must be read in the light of these later decisions. See, also, *Van Cortlandt v. Underhill*, 17 Johns. 405. But an award cannot be impeached collaterally by showing that the arbitrators erred in receiving evidence. *Viele v. T. & B. R. R. Co.*, 21 Barb. 381, affirmed on another point, 20 N. Y. 184. On a motion to vacate an award on the ground that improper evi-

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dence has been received, the question is, whether such evidence has been received which, by any probability, may have affected the conclusion of the arbitrators, and not whether such evidence was considered by them in making their award. If the evidence was received, it is impossible for the court to say that it did not affect the conclusion of the arbitrators. *Arbitration National Bank v. Darragh*, 17 Week. Dig. 290.

Where an arbitrator had before his selection examined the property he was to appraise, and expressed an opinion as to its value, and the award was clearly excessive, it was held to show partiality and misconduct. *Smith v. Cooly*, 5 Daly, 401. But the fact that previous to the arbitration one of the arbitrators consulted with defendant, and told him the claim was too high, does not show such partiality, corruption, or gross misbehavior as to invalidate the award. *French v. New*, 20 Barb. 481, reversed on another point, 28 N. Y. 147. An award cannot be objected to on the ground that the arbitrator did not hear the evidence, if it appears that the parties waived a hearing, and expected and intended that he should make his decision upon his personal knowledge. *Wiberly v. Matthews*, 91 N. Y. 648. Nor does the fact that the plaintiff communicated with his proposed arbitrator with reference to the controversy avoid the award, although the amount awarded is large. *Wood v. A. & R. R. R. Co.*, 8 N. Y. 160.

The fact that the arbitrators took into consideration matters not submitted to them is admissible in an action on an award, and if they did so, and the court cannot distinguish so as not to affect the justice of the case, the whole award is void. *Briggs v. Smith*, 20 Barb. 409; *Butler v. Mayor*, 7 Hill, 329; S. C. 1 Barb. 325; *Hiscock v. Harris*, 74 N. Y. 109. If an arbitrator exceeds his authority it is immaterial whether it is done consciously or by mistake. *Borrowe v. Milbank*, 6 Duer, 680. But there is a presumption that the arbitrators have acted within the submission till the contrary appears (*Solomons v. McKinstry*, 13 Johns. 27; *Pierce v. Morrison*, 6 Hun, 235); and even though the terms of an award are less comprehensive than the submission, the award is good unless it appears that the matters submitted were brought before the arbitrators which are not embraced in the award. *Ott v. Schroepfel*, 5 N. Y. 482. An entire award is not necessarily to be rejected because in some respects in excess of the submission, or invalid under the statute, if the objectionable parts can

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be separated. *Locke v. Filley*, 14 Hun, 139; *Martin v. Williams*, 13 Johns. 264; *Cox v. Jagger*, 2 Cow. 638; *Jackson v. Ambler*, 14 Johns. 96; *Doke v. James*, 4 N. Y. 567; *Keep v. Keep*, 17 Hun, 152; *Harrison v. Higham*, 15 Barb. 524; *Bacon v. Wilbur*, 1 Cow. 117. Otherwise, if the parts are dependent. *Schuyler v. Vanderveer*, 2 Caines, 235; *Jones v. Wellwood*, 71 N. Y. 208. Where an award is void in one particular, and that is the only act which the party is directed to do, and is the consideration intended for the act required of the other party, the whole is void. *Brozen v. Hankerson*, 3 Cow. 70.

An award must be certain and definite, so as to show what each party is required to do; if it is sufficiently certain to be obligatory as a contract it is valid, and if the several parts are consistent, and their meaning plain, the award will be upheld. *Schuyler v. Vanderveer*, 2 Caines, 235; *Perkins v. Giles*, 50 N. Y. 228; *Pierson v. Van Marter*, 17 Week. Dig. 183. An award is sufficiently certain though it requires a calculation, if the basis for the calculation is given. *Ludlow v. Grozart*, 3 Johns. Cas. 534. As in an award that defendant pay a certain sum, and each party pay his own witness' fees. *Weed v. Ellis*, 3 Caines, 253. If the submission fixes the time of payment, an award fixing the amount is sufficient. *Gomez v. Garr*, 6 Wend. 583, reversed on another point, 9 id. 549.

On a submission of partnership matters an award requiring one partner to pay the partnership debts is sufficiently certain. *Case v. Ferris*, 2 Hill, 75. And where a pending action is referred to arbitrators, an award for a sum and costs to which he has been subjected is sufficiently certain. *Boughton v. Scamans*, 9 Hun, 392. So an award on a boundary question is sufficient if it shows enough to enable each party to decide if his possession corresponds with the line. *Bacon v. Wilbert*, 1 Cow. 117. As an instance of sufficient award, see *Cutler v. Cutler*, 48 N. Y. Super. 470. An otherwise indefinite award may be cured by the recital. *Wood v. A. & R. R. Co.*, 8 N. Y. 160; *Butler v. Mayor*, 7 Hill, 329; *Mayor v. Butler*, 1 Barb. 325. An award incomplete on its face may be supplemented by parol evidence, and the rule requiring an award to be certain only requires that the meaning of the parties can be ascertained when all the evidence is before the court. When a portion of an award is void for uncertainty, it does not vitiate the residue if, by striking out the defective por-

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tion, a substantial, definite, and unobjectionable award remains. *Becker v. Bowen*, 61 N. Y. 317. An award that a contractor is entitled to his full bill, after deducting the bills paid him by persons named, is void for uncertainty. *Fallon v. Kelchar*, 16 Hun, 266. To same effect, *Wait v. Barry*, 12 Wend. 377. It is said, in *Hiscock v. Harris*, 74 N. Y. 109, that there are certain fundamental requisites and properties which awards must possess; among other things they must be within the submission, certain, and to a common intent and final. They must be within the submission, because to no other subjects or questions than to those embraced therein does their authority extend; they must be certain, that parties may know their rights and obligations; and they must be final, that the parties may not be remitted to a new controversy. The award in question in that action is then held to be void, among other things, for uncertainty.

Where there is a submission of all questions, and an intent appears to have everything decided, if anything is decided, an award deciding part only is void. An award that all causes of action were merged in and discharged by a contract, and ordering judgment and dismissing the complaint, but concluding that it is not intended to determine the rights of either of said parties under the contract, is not final and definite and should be set aside. *Jones v. Wellwood*, 71 N. Y. 208. It would be fatal to the award if any portion of the matters in dispute submitted to the arbitrator should be found not to have been decided by him, although the question whether an award is invalid does not depend on any absolute rule of law requiring the determination of all the matters submitted to give validity to an award, but upon the terms of the submission. *Merritt v. Thompson*, 27 N. Y. 225.

The reservation, by arbitrators, of a power over the thing submitted shows the award not to be final, and with this fundamental defect in an award it is void, and parties have a right to insist upon a legal objection. *Hiscock v. Harris*, 74 N. Y. 109. But this cannot be shown *dehors* the record. *Todd v. Barlow*, 2 Johns. Ch. 551. But an award by arbitrators who are empowered to determine the disposition of partnership property in payment of partnership debts is not void because it does not dispose of all the assets, unless the submission expressly provides that it must do so. It is valid as to all assets of which it disposes, and the

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others remain, as before, the joint property of the partners. *Backus v. Fobbs*, 20 N. Y. 204. While all matters submitted must be embraced in the award, it will be presumed this is done, but if the contrary appears award is void. *Wright v. Wright*, 5 Cow. 197; *Moore v. Cockcroft*, 4 Duer, 133. An award which leaves nothing to be done, except some ministerial act, as selecting from a designated stock, is final. *Owen v. Bocrum*, 23 Barb. 187. An award of payment of a specific sum stated that the party had a just claim to it, or more if insisted upon. It was held that the award was final, though no release was directed, and it was to be intended that the claimant consented to the reduction of the sum. *Solomons v. McKinstry*, 13 Johns. 27.

An award requiring a release by a married woman, who was not strictly a party to the arbitration, is good if the release is tendered. *Smith v. Sweeney*, 35 N. Y. 291. Where the submission of the question of boundary disclosed that the arbitrators were to be governed by an original tier lien, it was held that the conclusion of the arbitrators as to where that line was was conclusive. *Robertson v. McNeil*, 12 Wend. 578. Where the arbitrators awarded damages for slander the defendant cannot resist payment on the ground the words were not actionable. *Shephard v. Watrous*, 3 Caines, 166; see *French v. New*, 20 Barb. 481, reversed on another point, 28 N. Y. 147. Where arbitrators opened an account stated, the award was sustained. *Emmet v. Hoyt*, 17 Wend. 410.

If a verdict would not be set aside on same facts, an award will be sustained. *Wood v. A. & R. R. R. Co.*, 8 N. Y. 160. And an award will not be opened on the subsequent discovery of a receipt. *Todd v. Barlow*, 2 Johns. Ch. 551. In *Dater v. Wellington*, 1 Hill, 319, under a submission by partners as one party to a controversy, an award against one of them was sustained. Under submission of a claim against an insurance company, the arbitrators besides awarding a sum provided that the claimant should assign his claim to another company, *held*, within the powers of the arbitrators. *Nichols v. Rensselaer County Mut. Ins. Co.*, 22 Wend. 125. But an award requiring a party to do an act which it does not appear the party can control, is void to that extent. *Martin v. Williams*, 13 Johns. 264. As is an award that a sum claimed from a third party is invalid and not a bar to an action. *Brazil v. Isham*, 1 E. D. Smith, 437, affirmed on other grounds,

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12 N. Y. 9. A verbal award is not valid unless a verbal submission of the matters on which it is made would be binding. The fact that one of the parties by consenting to a verbal award prevented the arbitrators from making a valid award, will not deprive him of the right to show the invalidity of the one made. *French v. New*, 28 N. Y. 147. A court of equity will correct a mistake in an award of arbitrators and decree a performance. *Bouck v. Wilber*, 4 Johns. Ch. 405.

The court possesses no general supervisory power over awards, and if arbitrators keep within their jurisdiction, their award will not be set aside, because they have erred in judgment, either in fact or in law. *McGregor v. Sprott*, 13 Supp. 191.

An award must be vacated when the same does not show upon its face that it is definite and final and does not contain data for working out a definite and final determination of the controversy submitted. Upon the making and delivering of such a defective award, the arbitrators have no power to perfect it by a supplementary award, they being *functus officio*. *Herbst v. Hagenacrs*, 137 N. Y. 294, 50 St. Rep. 688, affirming 62 Hun, 573, 43 St. Rep. 55, 17 Supp. 59. In an arbitration between an insurance company and one assured, when it appears that the arbitrator appointed is an agent or advocate of the insurance company, after the company represented the arbitrator to be a disinterested person, the award should be set aside as obtained by fraud, and the assured allowed a remedy by action. *Bradshaw v. Agricultural Ins. Co.*, 42 St. Rep. 79, 16 Supp. 640. But an award will not be set aside where the arbitrator was a cousin to one of the parties and was a guest at his house during the hearing of the controversy, in the absence of evidence of undue partiality or fraud; neither, it seems, will the court set aside an award because arbitrators have erred in judgment either in fact or in law, for the courts possess no supervisory power over award if the arbitrators keep within their jurisdiction. *McGregor v. Sprott*, 13 Supp. 192, 35 St. Rep. 908. Where an arbitration is not a statutory arbitration, but is a common-law arbitration, the courts cannot set aside an award otherwise than by action. To set aside an award upon motion, it must be a statutory arbitration. *In re Dicarlo*, 13 Supp. 83. An award will be set aside if the rights of the parties have been prejudiced by the misbehavior of the arbitrators, or if the arbitrators, before taking testimony, have not taken the oath and

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the same is not waived by the parties, or if the arbitrators fail to administer the oath to witnesses, or if the umpire selected by arbitrators uses previous testimony taken before the arbitrators without rehearing the same, or if the award is not acknowledged, proved, or certified according to the requirements of § 2372. *Matter of Grening*, 74 Hun, 67, 56 St. Rep. 197. If arbitrators keep within their jurisdiction, their award will not be set aside for errors of law or fact upon the part of the arbitrators, but only for corruption, fraud, or misbehavior, and where an award is severable that part of it which is proper may be allowed to stand, while improper parts may be vacated. *Shrump v. Parfitt*, 84 Hun, 342, 33 Supp. 409, 67 St. Rep. 242. Where arbitrators make a supplementary award in excess of their jurisdiction, the same will be vacated; so, too, where the original award is not final and definite and does not contain data for such definite and final determination of the whole controversy. *Herbst v. Hagencrads*, 137 N. Y. 294.

ARTICLE V.

 JUDGMENT ON AWARD AND APPEAL THEREFROM. §§ 2378,
2379, 2380, 2381.
§ 2378. Judgment on award; when and how entered. Costs.

Upon the granting of an order confirming, modifying, or correcting an award, judgment may be entered in conformity therewith, as upon a referee's report in an action, except as is otherwise prescribed in this title. Costs of the application, and of the proceedings subsequent thereto not exceeding twenty-five dollars and disbursements, may be awarded by the court, in its discretion. If awarded, the amount thereof must be included in the judgment.

Id. § 14, am'd.

§ 2379. Judgment roll.

Immediately after entering judgment, the clerk must attach together and file the following papers, which constitute the judgment roll :

1. The submission ; the selection or appointment, if any, of an additional arbitrator, or umpire ; and each written extension of the time, if any, within which to make the award.
 2. The award.
 3. Each notice, affidavit, or other paper, used upon an application to confirm, modify, or correct the award, and a copy of each order of the court, upon such an application.
 4. A copy of the judgment.
- The judgment may be docketed, as if it was rendered in an action.
2 R. S. 541, § 15, and part of § 16, am'd.

§ 2380. Effect of judgment; how enforced.

The judgment so entered has the same force and effect, in all respects, as, and is

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subject to all the provisions of law relating to, a judgment in an action ; and it may be enforced, as if it had been rendered in an action in the court in which it is entered.

§ 2381. Appeal.

An appeal may be taken from an order vacating an award, or from a judgment entered upon an award, as from an order or judgment in an action. The proceedings upon such an appeal, including the judgment thereupon, and the enforcement of the judgment, are governed by the provisions of chapter twelfth of this act, as far as they are applicable.

Judgment.

NEW YORK SUPREME COURT—WESTCHESTER COUNTY.

Patrick J. Flannery

agst.

Aslan Sahagian.

134 N. Y. 88.
Judgment, March 21, 1890.

A dispute having arisen between the parties above named as to the payment by the said Aslan Sahagian to the said Patrick J. Flannery of the sum of \$1,350.04, amount of the final payment on a building contract claimed by the said Patrick J. Flannery to be due from said Aslan Sahagian, and said dispute having been duly submitted to certain arbitrators agreed upon by the said parties, and said arbitrators having duly made an award dated December 30, 1894, and having awarded and decided that the said Patrick J. Flannery was entitled to recover his final payment from said Aslan Sahagian, and that said payment amounted to \$1,350.04, with interest from December 30, 1889, and said award having been duly confirmed by an order of this court dated February 8, 1890, and it appearing that said Patrick J. Flannery is entitled to judgment against said Aslan Sahagian for the sum of \$1,350.04, with interest thereon from December 30, 1889, amounting to \$17.50, together with \$10 costs and disbursements herein ;

Now, on motion of F. X. Donoghue, attorney for Patrick J. Flannery, it is

Adjudged, that said Patrick J. Flannery recover of said Aslan Sahagian the sum of \$1,367.54 damages, and \$11.22 costs and disbursements, amounting in all to the sum of \$1,378.76, and that execution issue therefor.

JOHN M. DIGNEY,
Clerk.

The fact that the court has confirmed an award presents no obstacle to enjoining proceedings under it, if the award was of a matter which is not the subject of arbitration. *Wyatt v. Benson*, 23 Barb. 327. An action upon an award on a submission under the statute may be brought in the Supreme Court, although the submission provides for judgment in the county court. If defendant desires to move that court for relief he may obtain a stay

 Art. 6. Revocation of Award, or Death of Party.

of proceedings. The statute is cumulative merely, not exclusive, and the right of action on the award still remains. *Burnside v. Whitney*, 21 N. Y. 148.

It was held under the statute that on reviewing an order refusing to vacate an award and giving judgment thereon, the appellate court will not consider questions not raised in the court below. *Hollenbeck v. Fleming*, 6 Hill, 303. Also that the party aggrieved could, on appeal, review only the errors specifically pointed out by statute. *Dibble v. Camp*, 60 Barb, 150; *Ketcham v. Woodruff*, 24 id. 147; *Wilson v. Wilson*, 66 id. 209.

ARTICLE VI.

 REVOCATION OF AWARD, OR DEATH OF PARTY. §§ 2383, 2384,
2385, 2382.

§ 2383. Revocation of submission.

A submission to arbitration, made either as prescribed in this title or otherwise, cannot be revoked by either party, after the allegations and proofs of the parties have been closed, and the matter finally submitted to the arbitrators for their decision. A revocation, when allowed, must be made by an instrument in writing, signed by the revoking party, or his authorized agent, and delivered to the arbitrators, or one of them; and it is not necessary in any case, that the instrument of revocation should be under seal. Any party to a submission may thus revoke it; whether he is a sole party to the controversy, or one of two or more parties on the same side.

2 R. S. 541; part of § 23.

§ 2384. Liability of party who revokes.

Where a party expressly revokes a submission, made either as prescribed in this title or otherwise, any other party to the submission may maintain an action against him, and also against his sureties, if any, upon the submission, or any instrument collateral thereto, in which action the plaintiff may recover all the costs and other expenses, and all the damages, which he has incurred in preparing for the arbitration, and in conducting the proceedings to the time of the revocation. Either of the arbitrators may recover, in an action against the revoking party, his reasonable fees and expenses.

§ 2385. Limitation of recovery against him.

A sum, penalty, forfeiture, or damages, shall not be recovered for a revocation of a submission to arbitration, made either as prescribed in this title or otherwise, except as prescribed in the last section; notwithstanding any stipulated damages, penalty, or forfeiture, expressed in the submission, or in any instrument collateral thereto.

§ 2382. Effect of party's death, lunacy, etc., proceedings thereupon.

The death of a party to a submission, made either as prescribed in this title or otherwise, or the appointment of a committee of the person or property of such a party, as prescribed in title sixth of this chapter, operates as a revocation of the submission, if it occurs before the award is filed or delivered; but not afterwards. Where a party dies afterwards, if the submission contains a stipulation, authorizing

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the entry of a judgment upon the award, the award may be confirmed, vacated, modified, or corrected, upon the application of, or upon notice to, his executor or administrator, or a temporary administrator of his estate ; or, where it relates to real property, his heir or devisee, who has succeeded to his interest in the real property. Where a committee of the property, or of the person, of a party, is appointed, after the award is filed or delivered, the award may be confirmed, vacated, modified, or corrected, upon the application of, or notice to, a committee of the property, but not otherwise. In a case specified in this section, a judge of the court may make an order, extending the time within which notice of a motion to vacate, modify, or correct the award, must be served. Upon confirming an award, where a party has died since it was filed or delivered, the court must enter judgment in the name of the original party ; and the proceedings thereupon are the same, as where a party dies after a verdict.

Section 2383 is intended, as is said by the revisers, to abolish the rule laid down in *Van Antwerp v. Stewart*, 8 Johns. 125, and in *Robertson v. McNeil*, 12 Wend. 578 ; also to settle a conflict of authority in *Bloomer v. Sherman*, 5 Paige, 575 ; *Bank of Monroe v. Widner*, 11 id. 529, and *French v. New*, 20 Barb. 481, in accordance with the two former decisions. A revocation on condition is none the less a revocation, if effectual to take away the arbitrator's right to proceed. *Crofoot v. Allen*, 2 Wend. 494.

Both in common-law arbitrations and in statutory arbitrations, by virtue of § 2383, parties to an arbitration may terminate the same, and after such revocation the court has no authority to establish or maintain the submission, for it is as much out of existence as though no agreement had been made at any time providing for it. It follows that all parties are restored and remitted to the rights against each other which they had previous to the making of the agreement to submit, and these rights may be enforced by action. Where such arbitration has been terminated by revocation, equity will not restrain actions on the ground that a compromise was made. *Schupp v. Manly*, 59 Hun, 441, 36 St. Rep. 994, 13 Supp. 730.

The manner prescribed in § 2383 for revoking a submission to arbitration applies to common-law as well as to statutory arbitrations, and an arbitration cannot be revoked by the commencement of an action, it must be made by an instrument in writing signed by the revoking party or his authorized agent, and delivered to the arbitrators. *N. Y. Lumber Co. v. Schneider*, 15 Civ. Pro. 32, 1 Supp. 442, 119 N. Y. 478.

Arbitrators obtain their power merely by the continuing consent of the parties, and if an agreement to arbitrate, while yet executory, is broken by either party, the power of the arbitrators

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ceases. This is true both as to common-law arbitrations and as to arbitrations under the Code, and the submission may be revoked by any party at any time before the matter has been finally submitted to the arbitrators; and this is so, even though the submission to arbitration provides against any revocation, and although the party seeking to revoke expressly waived and abandoned his right to revoke for a valuable consideration. This, on the ground that such stipulations, like other executory agreements, if broken, simply leave to the other party an action for damages. *People ex rel. Union Insur. Co. v. Nash*, 111 N. Y. 315, 19 St. Rep. 75. If a party to an arbitration revoke the same, he is chargeable upon an action by the other party with all costs and other expenses incurred by the latter in preparing for the arbitration. *Union Insur. Co. v. Central Insurance Co.*, 24 Civ. Pro. 220, 66 St. Rep. 300, 32 Supp. 838, 87 Hun, 143. Where one party to an arbitration revokes the same, that party revoking and any sureties upon an undertaking collateral to the submission are liable in an action for all costs and other expenses, and for all damages incurred in preparing for the arbitration and in conducting the proceedings up to the time of revocation, notwithstanding the fact that the agreement for arbitration provided that the expenses should be borne proportionately by the parties and that no part of the costs should be recovered by the prevailing party or parties or be entered in the judgment. So held because the revocation of the submission destroyed the stipulation and left § 2384 in force. *Union Insur. Co. v. Central Trust Co.*, 87 Hun, 141, 36 Supp. 439, 32 Supp. 838, 24 Civ. Pro. 220; see S. C. 13 Supp. 18. See *Harris v. Hiscock*, 91 N. Y. 340, reversing 14 Week. Dig. 219, as to effect of death of one of parties and of arbitrators.

CHAPTER XXI.

FORECLOSURE BY ADVERTISEMENT. §§ 2387-2409.

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ARTICLE 1.

WHEN STATUTORY REMEDY MAY BE ENFORCED. § 2387.

§ 2387. When mortgage may be foreclosed.

A mortgage upon real property, situated within the State, containing therein a power to the mortgagee, or any other person, to sell the mortgaged property, upon

 Art. 1. When Statutory Remedy may be Enforced.

default being made in a condition of the mortgage, may be foreclosed, in the manner prescribed in this title, where the following requisites concur :

1. Default has been made in a condition of the mortgage, whereby the power to sell has become operative.

2. An action has not been brought to recover the debt secured by the mortgage, or any part thereof ; or, if such an action has been brought, it has been discontinued, or final judgment has been rendered therein against the plaintiff, or an execution, issued upon a judgment rendered therein in favor of the plaintiff, has been returned wholly or partly unsatisfied.

3. The mortgage has been recorded in the proper book for recording mortgages, in the county wherein the property is situated.

2 R. S. 545, §§ 1 and 2 (2 Edm. 564).

Under the Code of Procedure proceedings to foreclose a mortgage by advertisement were not included in the special proceedings provided for, and the matter was one treated exclusively by the Revised Statutes and acts amendatory thereof, and supplementary thereto, of which there were a considerable number. All of these provisions are now merged in the present title. A history of the proceedings to foreclose by advertisement in this State is given by Judge Andrews in *Mowry v. Sanborn*, 68 N. Y. 153. The same case is reported in 65 N. Y. 581, and 72 id. 534 ; also 7 Hun, 380, 62 Barb. 223, 11 Hun, 545. The remedy is solely and exclusively the creature of the statute, and hence all of the statutory requirements must be strictly complied with, and a failure so to do renders the proceedings void. *Van Slyke v. Sheldon*, 9 Barb. 278 ; *King v. Dantz*, 11 id. 191 ; *Cohoes. v Goss*, 13 id. 137 ; *Cole v. Moffit*, 20 id. 18 ; *St. John v. Bumpstead*, 17 id. 100 ; *Low v. Purdy*, 2 Lans. 422. This method of foreclosure is usually resorted to by reason of its economy as compared with foreclosure by action in cases where the mortgaged premises are not of sufficient value to bear the expenses of a sale in addition to the amount due. The principal objections are the fact that the proceedings are very strictly construed, and hence an error is fatal to the title, and that the writ of assistance does not issue to put the purchaser in possession as in an action. The remedy by summary proceedings has, however, been so adapted to obtaining possession by purchaser after sale, that this is of comparatively light weight, but the fact that no amendment can be made to the proceedings, together *with the inadequacy of the costs allowed*, has great weight with the profession, and it will be rarely used where there is sufficient property to pay all of the expenses of suit.

Art. I. When Statutory Remedy may be Enforced.

The statutes of this State regulating the **foreclosure** of mortgages by advertisement do not apply to mortgages on real estate without the State. *Elliott v. Wood*, 45 N. Y. 71. But where a mortgage was executed upon lands without the State, authorizing a sale after certain specified notices in this State, it was held that, in the absence of any statutory regulation, the parties had the power to agree upon the manner of sale; that while the statutes of this State in reference to the sale of mortgaged premises had reference only to real estate in this State, yet there being no proof that the sale provided for was illegal according to the laws of the State where the land was situated, there was no ground for equitable interference. *Carpenter v. Black Hawk Co.*, 65 N. Y. 43; *Central G. M. Co. v. Platt*, 3 Daly, 263. It is said in *Ferguson v. Kimball*, 3 Barb. Ch. 616, that a mortgage given to secure unliquidated damages cannot be foreclosed under the statute. In *Mowry v. Sanborn*, 68 N. Y. 153, the question is suggested but not passed upon. Mr. Moak in his argument in that case cites upon the point, *Ferguson v. Ferguson*, 2 N. Y. 360; *People ex rel. v. Potter*, 47 id. 375; see *Lockwood v. Turner*, 7 Wend. 458.

If a mortgage has already been foreclosed as to part and the decree provides for subsequent default, sale cannot be made under the statute. *Cox v. Wheeler*, 7 Paige, 250; see *Grosvenor v. Day*, Clarke's Ch. 109. As to how payment of a mortgage affects the power of sale, see *Cameron v. Erwin*, 5 Hill, 272; *Warner v. Blakeman*, 36 Barb. 501; s. c. affirmed, 4 Keyes, 487. Under the statute it was necessary, before a mortgage could be foreclosed by advertisement, that it should be duly recorded in the proper county. *Wells v. Wells*, 47 Barb. 416. A tender to the mortgagee or his assignee of the whole amount of the debt and interest, with the costs and charges, will render a subsequent sale on the mortgage irregular and void. *Burnet v. Denniston*, 5 Johns. Ch. 35. But the mortgage is not extinguished where the assignee takes a quit-claim deed of one-half of the mortgaged premises; at most this can only operate as an extinguishment of a portion of the mortgage debt, leaving the assignee at liberty to foreclose for the residue. *Klock v. Cronkhite*, 1 Hill, 107. The foreclosure must be made in the name of the real party in interest. *Cohoes Co. v. Goss*, 13 Barb. 137; *Slee v. Manhattan Co.*, 1 Paige, 48; see *Wilson v. Troup*, 2 Cow. 195. A surviving ex-

 Art. 2. Notice of Sale ; Contents, Filing, and Service.

utor may foreclose by statute. *Demarest v. Wynkoop*, 3 Johns. Ch. 129. Also a foreign executor or administrator. *Doolittle v. Lewis*, 7 Johns. Ch. 45 ; *Averill v. Taylor*, 5 How. 476.

Where a mortgage has been foreclosed by advertisement for the loan of moneys of the United States, § 2232 of the Code, which authorizes proceedings to recover possession against a person who holds over and continues in possession of real property after notice to quit has been served, does not apply where the mortgage gives no power to the mortgagee or other person to sell the mortgaged property upon a violation being made of a condition in the mortgage. The authority to sell on foreclosure by advertisement is special in its nature and must be strictly pursued or the sale will be invalid. *People v. Burdick*, 52 Hun, 350 ; 5 Supp. 363. Mortgages can be foreclosed under this statute only where they contain a power of sale and where they have been recorded in the county where the property is situated. These requirements are jurisdictional, and where a purchaser on foreclosure by advertisement brought summary proceedings under § 2332 of the Code and failed to allege in his petition the existence of a power of sale in the mortgage foreclosed, and also that the mortgage had been recorded in the county where the property was situated, it was held that the petition was defective. *Cowdrey v. Turner*, 85 Hun, 451, 66 St. Rep. 207, 32 Supp. 889.

ARTICLE II.

NOTICE OF SALE ; CONTENTS, FILING, AND SERVICE.

§§ 2391, 2388, 2389, 2390.

§ 2391. Contents of notice of sale.

The notice of sale must specify :

1. The names of the mortgagor, of the mortgagee, and of each assignee of the mortgage
2. The date of the mortgage, and the time when, and the place where, it is recorded.
3. The sum claimed to be due upon the mortgage, at the time of the first publication of the notice ; and, if any sum secured by the mortgage is not then due, the amount to become due thereupon.
4. A description of the mortgaged property, conforming substantially to that contained in the mortgage.

§ 2388. [Am'd, 1894.] Notice of sale ; how given.

The person entitled to execute the power of sale, must give notice, in the following manner, that the mortgage will be foreclosed, by a sale of the mortgaged property, or a part thereof, at a time and place specified in the notice :

1. A copy of the notice must be published, at least once in each of the twelve

 Art. 2. Notice of Sale ; Contents, Filing, and Service.

weeks, immediately preceding the day of sale, in a newspaper published in the county or in a municipal corporation a part of which is within the county in which the property to be sold, or a part thereof, is situated.

L. 1894, ch. 730.

2. A copy of the notice must be fastened up, at least eighty-four days before the day of sale, in a conspicuous place, at or near the entrance of the building, where the county court of each county, wherein the property to be sold is situated, is directed to be held ; or if there are two or more such buildings in the same county, then in a like place, at or near the entrance of the building nearest to the property ; or, in the city and county of New York, in a like place, at or near the entrance of the building, where the Court of Common Pleas for that city and county is directed by law to be held.

3. A copy of the notice must be delivered, at least eighty-four days before the day of sale, to the clerk of each county, wherein the mortgaged property, or any part thereof is situated.

4. A copy of the notice must be served, as prescribed in the next section, upon the mortgagor, or, if he is dead, upon his executor or administrator. A copy of the notice may also be served in like manner, upon a subsequent grantee or mortgagee of the property, whose conveyance was recorded, in the proper office for recording it in the county, at the time of the first publication of the notice of sale ; upon the wife or widow of the mortgagor, and the wife or widow of each subsequent grantee, whose conveyance was so recorded, then having an inchoate or vested right of dower, or an estate in dower, subordinate to the lien of the mortgage ; or upon any person, then having a lien upon the property, subsequent to the mortgage, by virtue of a judgment or decree, duly docketed in the county clerk's office and constituting a specific or general lien upon the property.

The notice, specified in this section, must be subscribed by the person entitled to execute the power of sale, unless his name distinctly appears in the body of the notice, in which case, it may be subscribed by his attorney or agent.

2 R. S. 545, § 3, am'd ; L. 1842, ch. 277, § 5 ; L. 1844, ch. 346, § 1, and L. 1857, ch. 308, § 1 (4 Edm. 534, 667).

§ 2389. [Am'd, 1887.] Id ; how served.

Service of notice of the sale, as prescribed in subdivision fourth of the last section, must be made as follows :

1. Upon the mortgagor, his wife, widow, executor, or administrator, or a subsequent grantee of the property, whose conveyance is upon record, or his wife or widow ; by delivering a copy of the notice, as prescribed in article first of title first of chapter fifth of this act, for delivery of a copy of a summons, in order to make personal service thereof upon the person to be served ; or by leaving such a copy, addressed to the person to be served, at his dwelling-house, with a person of suitable age and discretion at least fourteen days before the day of sale. If said mortgagor is a foreign corporation, or being a natural person, he or his wife, widow, executor, or administrator, or a subsequent grantee of the property whose conveyance is upon record, or his wife or widow, is not a resident of or within the State, then service thereof may be made upon them in like manner without the State, at least twenty-eight days prior to the day of sale.

2. Upon any other person, either in the same method, or by depositing a copy of the notice in the postoffice, properly inclosed in a postpaid wrapper, directed to the person to be served, at his place of residence, at least twenty-eight days before the day of sale.

Id. § 3, am'd ; L. 1887, ch. 685.

§ 2390. Duty of county clerk.

A county clerk, to whom a copy of a notice of sale is delivered, as prescribed in

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subdivision third of the last section but one, must forthwith affix it in a book, kept in his office for that purpose ; must make and subscribe a minute, at the bottom of the copy, of the time when he received and affixed it ; and must index the notice to the name of the mortgagor.

2 R. S. 545, § 3 in part, as am'd by L. 1857, ch. 308, § 1.

The spirit of the statute is that notice shall be given to those whose interests are to be affected. Thus, where the validity of foreclosure by advertisement is attacked because no copy of the notice of the mortgage to be foreclosed was served upon personal representatives, the court will assume that there were no personal representatives and that the notice was served upon the other parties in interest. Where there are no personal representatives of a deceased mortgagor the foreclosure is valid against those upon whom service is made. The intent of the section is that notice shall be served upon those whose interests are to be affected, and if the spirit of the statute is followed, it is valid, though the letter of the law may not have been followed. *Bond v. Bond*, 51 Hun, 509, 21 St. Rep. 684, 4 Supp. 570.

It is sufficient if the notice is published once in each week for twelve weeks successively, although all the publications are made within seventy-eight days, provided the first is eighty-four days prior to the date of sale, excluding the day on which the sale is made. *Howard v. Hatch*, 29 Barb. 297 ; *Cole v. Moffitt*, 20 id. 148 ; *Anonymous*, 1 Wend. 90. But the first publication must be at least eighty-four days before the day of sale, one day being excluded and the other included. *Bunce v. Reed*, 16 Barb. 347. It has been held that where the original notice of sale was defective, a republication with the several notices of postponement for the required twelve weeks was a substantial compliance with the statute. *Cole v. Moffitt*, 20 Barb. 18. A notice of sale, as filed in the clerk's office and published for the first four weeks, was, by mistake, dated April 23, 1858, instead of 1868 ; *held*, that the mistake was obvious on inspection and could not have misled, and did not invalidate the proceedings. *Mowry v. Sanborn*, 68 N. Y. 153.

The validity of the sale is not affected by the fact that the paper in which notice was published was not calculated to give general information. *Wake v. Hart*, 12 How. 444 ; *Jencks v. Alexander*, 11 Paige, 624. It is only required that the notice should be affixed to the door of the building where county courts

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are held; it is not necessary the person affixing it should afterward see it there. *Merritt v. Bowen*, 7 Cow. 13; *Hornby v. Cramer*, 12 How. 490. Where the land lies in several counties the notice must be posted in each county, and a copy delivered to the clerk of each county. *Wells v. Wells*, 47 Barb. 416. If service of notice is not made upon a party entitled thereto his claim is not barred or foreclosed, or his rights affected by the sale, and the assignee of a subsequent incumbrance stands in place of the original owner; actual notice of sale is insufficient. *Root v. Wheeler*, 12 Abb. 294; *Dwight v. Phillips*, 48 Barb. 116; *Winston v. McCall*, 32 id. 241; *Wetmore v. Roberts*, 10 How. 51; *Mowry v. Sanborn*, 65 N. Y. 581; see *Mickles v. Dillaye*, 15 Hun, 296. And personal representatives of a deceased mortgagor must be served. *Cole v. Moffitt*, 20 Barb. 18; *St. John v. Bumpstead*, 17 id. 100; compare *Bond v. Bond*, 51 Hun. 509, *supra*. But his heirs or devisees need not be; his wife must if she join in the mortgage. *Andersen v. Austin*, 34 Barb. 319; *Loew v. Purdy*, 2 Lans. 422; *King v. Duntz*, 11 Barb. 191. Service on the wife of the mortgagor, if there is no personal representative, is not a valid service. *Mackenzie v. Alster*, 64 How. 388. The wife of a grantee of premises already mortgaged for the purchase money should be served with notice in order to cut off her inchoate right of dower. *Northrup v. Wheeler*, 43 How. 122. But an omission to serve her will not affect the validity of the sale as to other property served, and a subsequent incumbrancer is cut off by such a sale. *Hubbell v. Sibley*, 5 Lans. 51, affirmed, 50 N. Y. 468. Where the statute required notice to be served not only on those subsequent grantees and mortgagees "whose conveyances were on record at the time of the first publication of the notice," but is required to be served upon all persons having a lien by or under a judgment, the lien of a judgment perfected after publication of the first notice, and before sale, is not cut off. *Groff v. Morehouse*, 51 N. Y. 503. But as to the present statute see § 2395, subdivision 4, which is intended to obviate this difficulty. On the foreclosure by advertisement, only those mortgagees or assignees whose mortgages or assignments are recorded are entitled to notice. *Decker v. Boice*, 19 Hun, 152, affirmed, 83 N. Y. 215. The provisions of the statute as to publication, posting, and service, must all be complied with, or the proceeding will be void. *Van Slyke v. Sheldon*, 9 Barb. 278; *King v. Duntz*, 11 id.

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191; *Stanton v. Kline*, 16 id. 9; *Cole v. Moffitt*, 20 Barb. 18. In computing the time for the publication, posting, and service of notices, the first day is to be excluded and the last included. *Westgate v. Handlin*, 7 How. 372; *Hornby v. Cramer*, 12 id. 493; *Bunce v. Reed*, 16 Barb. 347.

Where the affidavits on file showed service on the mortgagor by mail, at a particular place of residence, *held*, that the omission was fatal, and could not be supplied by an amendment on the trial which involved the validity of the foreclosure. The court cannot supply omissions or remedy defects in the proceedings. *Dwight v. Phillips*, 48 Barb. 116; see *contra*, *Bunce v. Reed*, 16 id. 347. And where it was attempted to serve notice by mail upon the mortgagor, but the notice was by mistake addressed to her at a place other than her residence, the sale was held void. *Robinson v. Ryan*, 25 N. Y. 320. It does not invalidate the sale if the notice is properly directed to an administratrix, simply omitting her title as such. *George v. Arthur*, 2 Hun, 406. Notice may be served on the mortgagor by mail by depositing it in any postoffice in the State. *Bunce v. Reed*, 16 Barb. 347. In case of service by mail the time is counted from the deposit of the letter, not from the date of the postmark or the time of forwarding. *Hornby v. Cramer*, 12 How. 490. In foreclosing a mortgage by advertisement it is not requisite that personal service of notice of sale should be made, though the parties live in the same town with the party foreclosing or his attorney. In such case it is a compliance with the statute if copies of the notices are deposited in the postoffice at the place where the parties reside, properly directed. *Stanton v. Kline*, 11 N. Y. 196. If the mortgagor be dead notice must be served on the executor or administrator, and one must be appointed to have valid foreclosure. *Mackenzie v. Alster*, 64 How. 388; see to same effect, *Van Schaack v. Sanders*, 32 Hun, 515, both citing a large number of cases.

If the notice of sale does not state the place of sale, the equity of redemption will not be barred. *Burnet v. Denniston*, 5 Johns. Ch. 35. Notice for sale at the "City Hall" is sufficient. *Hornby v. Cramer*, 12 How. 490. Where the name of the mortgagee was omitted from the description of the mortgage contained in the notice of sale but was subscribed to the notice, the requirements of the statute were held to be substantially complied with,

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and so if it sufficiently refers to the record in the clerk's office. *Candee v. Burke*, 1 Hun, 546. It is not necessary to state in the notice of sale fully the authority by virtue of which the subscribers foreclose. *People v. Prescott*, 3 Hun, 419. It has been held that where the notice of sale was for Sunday, the mortgagee might before the day postpone to another day and make a valid sale under the notice. *Westgate v. Handline*, 7 How. 372. Where the notice of sale stated the premises were to be sold under three mortgages instead of two, it was held to be irregular and void. *Burnet v. Denniston*, 5 Johns. Ch. 35. But this is not so as to a mistake, a correction of which is published with the notice before it can be presumed to have influenced persons desiring to bid, as where, by mistake, the notice of sale stated a prior incumbrance upon the mortgaged property at twice its actual amount, but a correction was published with the notice two weeks before the sale. *Hubbell v. Sibley*, 5 Lans. 51, affirmed, 50 N. Y. 468 ; see *Bunce v. Reed*, 16 Barb. 347. It is said that claiming more than the amount actually due does not vitiate where no fraud is shown. *Mowry v. Sanborn*, 62 Barb. 223, reversed on another point, 65 N. Y. 581 ; see s. c. 68 id. 153, 72 id. 534. But a foreclosure is void if the description in the notice does not conform substantially to that in the mortgage. *Rathbone v. Clarke*, 9 Abb. 66, n. The notice sufficiently specifies where the mortgage is recorded by stating the clerk's book and date of record though the number of the book is erroneously given. It is, however, essential that the notice should state that the mortgage will be foreclosed by sale. A mere notice of sale, without declaring it to be for purposes of foreclosure or in execution of the power of sale contained in the mortgage, is insufficient. *Judd v. O'Brien*, 21 N. Y. 186. A sale subject to payment of future instalments without specifying the amount of such instalments in the notice of sale, is void. *Jenks v. Alexander*, 11 Paige, 619. Stating in the notice the amount due on the day before publication is not fatal. It is surplusage to state that the premises are subject to a lease, and the omission to state how long the lease mentioned in a notice has to run does not affect the sale. *Hubbell v. Sibley*, 5 Lans. 51, affirmed, 50 N. Y. 468. Under a statutory foreclosure it is lawful to sell the property free and clear of all incumbrances. It is not essential that such terms should be included in the published notice of foreclosure. The

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affidavits required by statute are not conclusive as to the facts when the premises are purchased by the owner of the mortgage, and where the terms of sale are not stated therein, oral evidence is admissible to prove them. *Story v. Hamilton*, 86 N. Y. 428. To the point that the affidavits are not conclusive and may be controverted, the court cites *Mowry v. Sanborn*, 72 N. Y. 534; s. c. 68 id. 160.

Precedent for Notice of Foreclosure.

WHEREAS, Default has been made in the payment of the money secured by a certain mortgage, bearing date the 29th day of January, 1883, made and executed by Joseph Reil, Jr., of the town of Hardenburgh, Ulster County, New York, as mortgagor to John Q. Adams, of Clarryville, Sullivan County, New York, which said mortgage was given as collateral security for the payment of a portion of the purchase-money of the premises described in said mortgage, and was duly recorded in the Ulster County clerk's office, in book No. 166 of mortgages, page 61, on the 2d day of August, 1883, at one hour and thirty minutes, p. m., and no suit or proceeding having been begun or instituted at law to recover the debt secured by said mortgage, or any part thereof; and,

WHEREAS, Said mortgage was duly assigned by John Q. Adams, said mortgagee in said mortgage, to Cornelius Van Brunt, of the city of New York, which said assignment was dated April 30, 1886, and recorded in Ulster county clerk's office, April 30, 1886, book of mortgages 178, page 345; and,

WHEREAS, The amount claimed to be due on the said mortgage, at the first publication of this notice, is the sum of \$2,210.89, namely, \$2,150 principal, and \$60.89 interest, and that the whole amount remaining unpaid is the sum of \$2,210.89:

Now, therefore, notice is hereby given according to statute in such case made and provided, that by virtue of the power of sale contained in said mortgage, duly recorded therewith as aforesaid, the said mortgage will be foreclosed by a sale of the premises herein described by the subscriber, the mortgage assignee therein, at public auction, on the 11th day of March, 1887, at twelve o'clock noon of that day, at the front door of the court-house, in the city of Kingston, Ulster County, N. Y.

The following is a description of the mortgaged premises, so as aforesaid to be sold, as they are contained in the said mortgage: (Here insert description.)

The above mortgaged premises will be sold free and clear from incumbrances, and subject to the condition of the said mortgage.

Dated at Kingston, December 14, 1887.

V. B. VAN WAGONEN,

Assignee's Attorney.

CORNELIUS VAN BRUNT,

Mortgage Assignee.

Where a notice of appearance waives "service of all papers

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except notice of sale and of surplus in this action, which are to be served on us at our office," the mere statutory publication of the advertisement of sale in the newspapers is an insufficient notice to the attorneys, but notice of the sale, which may consist of a copy of the advertisement, must be served on them in the ordinary way. *Eidlitz v. Doctor*, 24 Misc. 209, 53 Supp. 525, 87 St. Rep. 525. Where the mortgage has been assigned as collateral security the assignment must be mentioned in the proceedings. *Weir v. Birdsall*, 27 App. Div. 404, 50 Supp. 275, 84 St. Rep. 275.

ARTICLE III.

SALE; ITS EFFECT AND RECORD THEREOF. §§ 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400.

§ 2392. Sale ; how postponed.

The sale may be postponed, from time to time. In that case, a notice of the postponement must be published, as soon as practicable thereafter, in the newspaper in which the original notice was published; and the publication of the original notice and of each notice of postponement, must be continued, at least once in each week, until the time to which the sale is finally postponed.

§ 2393. Id. ; how conducted.

The sale must be at public auction, in the daytime, on a day other than Sunday or a public holiday, in the county in which the mortgaged property, or a part thereof, is situated; except that, where the mortgage is to the people of the State, the sale may be made at the Capitol. If the property consists of two or more distinct farms, tracts, or lots, they must be sold separately; and as many only of the distinct farms, tracts, or lots, shall be sold, as it is necessary to sell, in order to satisfy the amount due at the time of the sale, and the costs and expenses allowed by law. But where two or more buildings are situated upon the same city lot, and access to one is obtained through the other, they must be sold together.

§ 2394. Mortgagee, etc., may purchase.

The mortgagee, or his assignee, or the legal representative of either, may, fairly and in good faith, purchase the mortgaged property, or any part thereof, at the sale.

§ 2395. Effect of sale.

A sale, made and conducted as prescribed in this title, to a purchaser in good faith, is equivalent to a sale, pursuant to judgment in an action to foreclose the mortgage, so far only as to be an entire bar of all claim or equity of redemption, upon, or with respect to, the property sold, of each of the following persons :

1. The mortgagor, his heir, devisee, executor, or administrator.
2. Each person claiming under any of them, by virtue of a title or of a lien by judgment or decree, subsequent to the mortgage, upon whom the notice of sale was served, as prescribed in this title.
3. Each person so claiming, whose assignment, mortgage, or other conveyance was not duly recorded in the proper book for recording the same in the county, or whose

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judgment or decree was not duly docketed in the county clerk's office, at the time of the delivery of a copy of the notice of said sale to the clerk of the county ; and the executor, administrator, or assignee of such a person.

4. Every other person, claiming under a statutory lien or incumbrance, created subsequent to the mortgage, attaching to the title or interest of any person, designated in either of the foregoing subdivisions of this section.

5. The wife or widow of the mortgagor, or of a subsequent grantee, upon whom notice of the sale was served as prescribed in this title, where the lien of the mortgage was superior to her contingent or vested right of dower, or her estate in dower.

2 R. S. 545, § 8, am'd ; L. 1842, ch. 277, and L. 1844, ch. 346, § 4 (4 Edm. 535, 668).

§ 2396. Affidavit of sale, and of posting, serving, etc., notices.

An affidavit of the sale, stating the time when, and the place where, the sale was made ; the sum bid for each distinct parcel, separately sold ; and the name of the purchaser of each distinct parcel, may be made by the person, who officiated as auctioneer upon the sale. An affidavit of the publication of the notice of sale, and of the notice or notices of postponement, if any, may be made by the publisher or printer of the newspaper in which they were published, or by his foreman or principal clerk. An affidavit of the affixing of a copy of the notice, at or near the entrance of the proper court-house, may be made by the person who so affixed it, or by any person who saw it so affixed, at least eighty-four days before the day of sale. An affidavit of the affixing of a copy of the notice in the book, kept by the county clerk, may be made by the county clerk, or by any person who saw it so affixed, at least eighty-four days before the day of sale. An affidavit of the service of a copy of the notice upon the mortgagor, or upon any other person upon whom the notice must or may be served, may be made by the person who made the service. Where two or more distinct parcels are sold to different purchasers, separate affidavits may be made with respect to each parcel, or one set of affidavits may be made for all the parcels.

Id. § 9, and am'd L. 1844, ch. 346 ; L. 1857, ch. 308, consolidated and am'd.

§ 2397. [Am'd, 1882.] When one affidavit suffices printed notice to be annexed.

The matters required to be contained in any or all of the affidavits, specified in the last section, may be contained in one affidavit, where the same person deposes with respect to them. A printed copy of the notice of sale must be annexed to each affidavit ; and a printed copy of each notice or postponement must be annexed to the affidavit of publication and to the affidavit of sale. But one copy of the notice suffices for two or more affidavits where they all refer to it and are annexed to each other and filed and recorded together.

2 R. S. 545, part of § 9, am'd.

§ 2398. Affidavits may be filed and recorded.

The affidavits, specified in the last two sections, may be filed in the office for recording deeds and mortgages, in the county where the sale took place. They must be recorded at length by the officer with whom they are filed, in the proper book for recording mortgages. The original affidavits, so filed, the record thereof, and a certified copy of the record, are presumptive evidence of the matters of fact therein stated, with respect to any property sold, which is situated in that county. Where the property sold is situated in two or more counties, a copy of the affidavits, certified by the officer with whom the originals are filed, may be filed and recorded in each other county, wherein any of the property is situated. Thereupon the copy and the record thereof have the like effect, with respect to the property in that county, as if the originals were duly filed and recorded therein.

Id. § 11, am'd, and part of § 12.

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§ 2399. Note upon record of mortgage.

A clerk or a register, who records any affidavits, or a certified copy thereof, filed with him, must make a note, upon the margin of the record of the mortgage, in his office, referring to the book and page, or the copy thereof, where the affidavits are recorded.

§ 2400. Deed not necessary. When affidavits not necessary ; but purchaser may require them.

The purchaser of the mortgaged premises, upon a sale conducted as prescribed in this title, obtains title thereto, against all persons bound by the sale, without the execution of a conveyance. Except where he is the person authorized to execute the power of sale, such purchaser also obtains title, in like manner, upon payment of the purchase money, and compliance with the other terms of sale, if any, without the filing and recording of the affidavits, as prescribed in the last section but one. But he is not bound to pay the purchase money, until the affidavits, specified in that section, with respect to the property purchased by him, are filed, or delivered or tendered to him for filing.

Id. § 14, am'd ; L. 1838, ch. 266, § 8 ; see § 2396.

It is unnecessary to give personal notice of postponement of sale, publication is all that is necessary, and it is said that a postponement from Sunday is sufficient. *Westgate v. Handlin*, 7 How. 372. The practice is to appear and adjourn the sale. Where public notice was given of postponement, and the sale afterward made on the original date fixed for sale, it was held void. *Jackson v. Clark*, 7 Johns. 225. And so held where, on the day appointed for the sale, an adjournment was announced for a specified time to those present, but a notice subsequently published was for a different day. *Miller v. Hull*, 4 Denio, 104.

Form of Notice of Postponement.

The sale above noticed is hereby postponed to the 25th day of March, 1887, at the same time and place mentioned in the foregoing notice.

Dated March 11, 1887.

V. B. VAN WAGONEN, CORNELIUS VAN BRUNT,
Attorney for Assignee. Assignee of Mortgagee.

It was held in *Lamerson v. Marvin*, 8 Barb. 9, that when lands were mortgaged as one undivided lot or parcel, and are subsequently subdivided, that the mortgagee is not bound to sell in parcels, and the same rule is followed in *Hubbell v. Sibley*, 5 Lans. 51 ; *Ellsworth v. Lockwood*, 9 Hum. 548. When the premises do not consist of distinct farms, parcels, or lots, they need not be sold separately. *Holden v. Gilbert*, 7 Paige, 211 ; *Hadley v. Chapin*, 11 id. 248 ; *Bunce v. Reed*, 16 Barb. 350 ; *Anderson v. Austin*, 34 id. 319. The case of *Ellsworth v. Lockwood*, 42 N. Y.

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89, holds that equity will relieve against a sale in gross of property mortgaged in one tract where a prior incumbrancer offers to bid the whole amount due for one parcel, which could have been sold separately. On subsequent appeal in same case to General Term, 9 Hun, 548, the case is distinguished, and the general principle reiterated, that it is not necessary where division has taken place since the mortgage. As to the effect of a sale of premises subject to instalments, see *Cox v. Wheeler*, 7 Paige, 250 ; *Jencks v. Alexander*, 11 id. 626. The requirements of § 2393 that real property consisting of two or more lots must be sold separately, and only as many be sold as shall satisfy the amount due at the time of the sale, with costs and expenses, are mandatory and absolute, and thus where the record does not show the sale of the entire property which consisted of several lots was necessary, a purchaser cannot be required to accept a doubtful title. *Hemmer v. Hustace*, 51 Hun, 458, 14 Civ. Pro. 260, 22 Abb. N. C. 419, 3 Supp. 851.

It is the policy of the statute that foreclosures and sales should in cases free from fraud or gross irregularity be held final and conclusive. *Jackson v. Henry*, 10 Johns. 195 ; *Doolittle v. Lewis*, 7 Johns. Ch. 50 ; *Slee v. Manhattan Co.*, 1 Paige, 70 ; *Vroom v. Ditmas*, 4 id. 531 ; *Wilson v. Troup*, 2 Cow. 195. But in order to cut off the rights of the mortgagor and of subsequent purchasers and incumbrancers, the requirements of the statute must be substantially complied with, and what is a substantial compliance is to be determined with regard to its objects. These objects being to relieve parties from the expense of a suit and to enable persons not learned in law to conduct the foreclosure, the construction of the statute should be liberal and not technical. *Jackson v. Henry*, 10 Johns. 195 ; *Vroom v. Ditmas*, 4 Paige, 526 ; *Hubbell v. Sibley*, 5 Lans. 51. A regular foreclosure bars the claim of the mortgagor to all persons having liens subsequent to the mortgage. *Hornby v. Cramer*, 12 How. 490. A sale during the life of the mortgagor, under a power of sale in a purchase-money mortgage, bars the inchoate right of dower of the wife of such mortgagor who was not a party to the instrument. *Brackett v. Baum*, 50 N. Y. 8. And the omission to make the wife of the mortgagor a party, she having joined in the mortgage, merely leaves her the right of redemption, it does not render the foreclosure invalid as to the

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other parties properly served. *Candee v. Burke*, 1 Hun, 546. But the claim of a person not served is not barred, even though he had actual notice of the sale. *Root v. Wheeler*, 12 Abb. 294 ; *Van Slyke v. Selden*, 9 Barb. 284 ; *King v. Duntz*, 11 id. 193 ; *Stanton v. Kline*, 16 id. 9 ; *St. John v. Bumpstead*, 17 id. 100 ; *Cole v. Moffitt*, 20 id. 18 ; *Wetmore v. Roberts*, 10 How. 51. But a purchaser at a sale which is void for want of notice will be regarded as assignee of the mortgage. *Robinson v. Ryan*, 25 N. Y. 320. In case the mortgage is usurious, the sale does not convey a good title except to a *bona fide* purchaser at the sale. *Jackson v. Dominick*, 14 Johns. 435 ; *Bissell v. Kellogg*, 60 Barb. 617, affirmed, 65 N. Y. 432 ; *Hyland v. Stafford*, 10 Barb. 558 ; *Dix v. Van Wyck*, 2 Hill, 523. Even a *bona fide* purchaser at a sale under a paid mortgage acquires no title ; but will be protected by the court where notice has been given the mortgagor. *Cameron v. Erwin*, 5 Hill, 272 ; *Warner v. Blakeman*, 36 Barb. 501. And a sale under the power after a tender of the amount due by a subsequent lienor of the amount of the debt and interest is void where the purchaser has notice of that fact. *Burnet v. Denniston*, 5 Johns. Ch. 35. The interest of a tenant under a demise from the mortgagor made subsequent to the mortgage is extinguished by the sale. *Simers v. Saltus*, 3 Denio, 214. In such case a mortgagee who has acquired the actual possession of the premises is entitled to the crops sown by the lessee and growing on the land at the time of sale, and the same rule holds good as to fixtures. *Lane v. King*, 8 Wend. 584 ; *Aldrich v. Reynolds*, 1 Barb. Ch. 613 ; *Shepherd v. Philbrick*, 2 Denio, 176 ; *Gillett v. Balcom*, 6 Barb. 370 ; *Gardner v. Finley*, 19 id. 317. Courts of equity regard a mortgagee in the execution of the power of sale contained in the mortgage by statutory foreclosure as a trustee executing a power in trust, and bound to conduct the proceedings fairly and in good faith. Relief will be given by suit to set aside such proceedings in case of fraud or bad faith, upon much the same grounds as are sufficient for opening the sale where the foreclosure has been by action. *Soule v. Ludlow*, 3 Hun, 503. Before the enactment of § 379, an action to redeem from a mortgage foreclosure must have been brought within ten years instead of twenty years as provided by that section. *Hubbell v. Sibley*, 50 N. Y. 468. Where the terms of sale have been carried into effect, the fact that the contract was not

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signed as required by the statute of frauds is immaterial. If the sale is irregular the owner of the equity of redemption cannot attack it in an action to recover an alleged surplus arising thereon; he cannot affirm it without being bound by its terms. It seems that if dissatisfied the remedy of such owner is by motion to set the sale aside.

Where property has been sold upon terms publicly stated at the time of sale, though not included in the printed notice, the mortgagor cannot affirm the sale as to the price bid when made upon the terms stated, and then repudiate the terms of sale, and claim, as surplus proceeds thereof, money which, by the terms of sale, was to be applied in payment of a prior mortgage, as though no such terms controlled the action and bid of the mortgagee. The auctioneer having stated, as the terms of sale, that the property was to be sold as if unincumbered, the purchaser to pay out of the amount for which the property should be struck off to him the amount of a prior mortgage lien then being foreclosed. *Held*, that the terms of sale were legal, proper, and effectual, and that the application of the proceeds was controlled thereby. *Story v. Hamilton*, 86 N. Y. 428. A statutory sale, under a subsequent mortgage, does not affect one in possession under a contract of sale. *Dwight v. Phillips*, 48 Barb. 116.

If the mortgagee purchases on a sale for an instalment his mortgage is merged, but if a third person purchases, the mortgagor, if compelled to pay the balance of the debt by a suit on the bond, can have a reassignment of the mortgage, to enable him to secure repayment out of the land. *Cox v. Wheeler*, 7 Paige, 248. The sale may be made by the mortgagee or owner of the mortgage, and he may himself become the purchaser and make the affidavit which stands in place of the conveyance. *Hubbell v. Sibley*, 5 Lans. 51. It is said, in the earlier cases, that all the requirements of the statute must be strictly complied with. *Layman v. Whiting*, 20 Barb. 559; *Bryan v. Butts*, 27 id. 503. But it is said, in *Mowry v. Sanborn*, 72 N. Y. 534, that the statutory proofs of foreclosure and sale are to be liberally construed, and are only required to be certain to a common intent, and if they are so, though technically defective, they are sufficient. Reversing 11 Hun, 545, If the affidavits are defective, amended affidavits, it seems, may be filed according to the fact, and, at least, as to the mortgagor, they may be filed at any

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time, or other proof given. *Bunce v. Reed*, 16 Barb. 352 ; *Mowry v. Sanborn*, 72 N. Y. 534. A different rule seems to be held in *Dwight v. Phillips*, 48 Barb. 116, but the rule above is reiterated in *Story v. Hamilton*, 86 N. Y. 428. The affidavits may be taken before a notary public, and one copy of the notice of sale, to which all the affidavits are annexed, is sufficient ; it is not necessary to annex a separate copy to each affidavit. The affidavits are *prima facie* evidence of the facts stated, and may be controverted ; the power to sell does not rest on the *proof* of publication, but on the *fact* of the publication, and this may be shown independent of the affidavit. *Mowry v. Sanborn*, 68 N. Y. 153 ; *Mowry v. Sanborn*, 72 id. 534. It is sufficient if the affidavit of publication is made by the publisher of the papers in which it was printed. *Bunce v. Reed*, 16 Barb. 347. If the affidavit shows the notice was affixed twelve weeks before the sale, it is sufficient without showing that the party making the affidavit afterward saw it there. *Hornby v. Cramer*, 12 How. 491. The affidavits must show the places to which the notices were mailed to the parties were the residences of such parties. *Dwight v. Phillips*, 48 Barb. 116. All the affidavits showing a compliance with the provisions of the statute are essential, in the absence of a deed, to perfect the purchaser's title. *Layman v. Whiting*, 20 Barb. 559. And the affidavits should show that the proceedings were conducted according to the law in force when the foreclosure was commenced. *James v. Stull*, 9 Barb. 482. Where the premises are purchased by the mortgagee, the foreclosure is not complete without the affidavits which stand in the place of the deed. *Arnot v. McClure*, 4 Denio, 41 ; *Cohoes Company v. Goss*, 13 Barb. 138 ; *Layman v. Whiting*, 20 id. 559 ; *Bryan v. Butts*, 27 id. 503 ; *Howard v. Hatch*, 29 id. 297. If no affidavits are made, and a person other than the mortgagor is the purchaser, common-law proof may be made of publication of notice. *Brewster v. Power*, 10 Paige, 563 ; see, also, *Chalmers v. Wright*, 5 Robt. 713. The mortgagee's deed is not sufficient to convey title unless the sale was at public auction after statutory notice ; and this is so even though the mortgage gives power of sale, expressly authorizing the mortgagee, on default, to sell the premises at private sale. *Lawrence v. Loan Company*, 13 N. Y. 200. A title is not good in a sale on foreclosure by advertisement until the affidavits of sale, of publication, and

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of service of notice have been filed and recorded. *Cowdrey v. Turner*, 85 Hun, 452, 66 St. Rep. 207, 32 Supp. 889.

Affidavit of Affixing by Clerk.

STATE OF NEW YORK, }
 COUNTY OF ULSTER, } ss. :

Martain S. Decker, deputy county clerk, of the city of Kingston, said county, being duly sworn, says that he is the deputy county clerk of said county of Ulster, the county in which the mortgaged premises described in the annexed printed notice of sale are situated ; that on the 17th day of December, 1886, he did affix a printed copy of notice of sale, a copy whereof is also hereto annexed, in a book prepared and kept by the clerk of said county of Ulster for that purpose ; and also immediately entered in said book, at the bottom of such notice, the time when he received and affixed it, and did also immediately index the same to the name of the mortgagor in said notice name. Deponent further says that the time when he did and performed said acts was at least eighty-four days prior to the time in said notice specified for the sale of the mortgaged premises therein described.

(*Jurat.*)

(Signature.)

Affidavit of Auctioneer.

STATE OF NEW YORK, }
 COUNTY OF ULSTER, } ss. :

Virgil B. Van Wagonen, of Kingston, in the county of Ulster, being duly sworn, doth depose and say that he is the person who officiated as auctioneer at the sale of the premises described in the annexed printed copy of the notice of sale by virtue of the mortgage therein mentioned, and pursuant to said notice, and that this deponent as such auctioneer, and at public auction on the 11th day of March, 1887, at twelve and a quarter o'clock in the afternoon of that day, at the front door of the courthouse in the city of Kingston, county of Ulster, New York, by virtue of the power of sale contained in said mortgage, and pursuant to said notice, did sell to Cornelius Van Brunt, of the city and county of New York, upon the terms and subject to the reservations and conditions hereinafter mentioned, the lands and premises, a description whereof is contained in said mortgage, and set forth in said notice as follows : (Here insert description as in notice.)

Deponent further says that at said sale the said Cornelius Van Brunt purchased the said lands and premises above described at and for the price of \$1,500, he being the highest bidder therefor, and that being the highest sum bidden for the same. Deponent further says that such sale was in the daytime, and in all respects honestly and fairly and legally conducted, according to deponent's best knowledge and belief ; that the premises, so far as the same consisted of distinct tracts, farms, or lots, were sold separately, and no

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more tracts, farms, or lots were sold than were necessary to satisfy the amount claimed to be due on said mortgage in said notice, at the day of the first publication thereof, and interest and costs and expenses allowed by law.

(*Jurat.*)

(Signature.)

Affidavit of Affixing on Court-house Door.

V. B. Van Wagonen, of the city of Kingston, in the county of Ulster and State of New York, being sworn, saith he did, on the 18th day of December, 1886, and at least eighty-four days prior to the time specified in the annexed printed copy of notice for the sale of the mortgaged premises therein described, fasten up a copy of the annexed printed notice in a proper and substantial manner, in a conspicuous place at or near the entrance of the building where the county court of said county of Ulster is directed to be held, to wit : on the outer side of the outward door of the court-house or building in the city of Kingston, where the county courts are directed and appointed to be held, in and for the county of Ulster, in which said mortgaged premises are situated, that being the court-house or building where county courts of said county are directed and appointed to be held, nearest to said mortgaged premises.

(*Jurat.*)

(Signature.)

Affidavit of Publication.

STATE OF NEW YORK, }
 ULSTER COUNTY, } ss.:

John W. Searing, of the city of Kingston, Ulster County, State of New York, being duly sworn, doth depose and say that he is, and during the time of the publication was, one of the publishers and proprietors of the newspaper called the Kingston Weekly Leader a public newspaper printed and published in the city of Kingston, county of Ulster, that being the county where the premises described in the annexed printed notice of sale, or part thereof, are situated. Deponent further says that the notice of the mortgage sale, of which a printed copy is hereto annexed, was published in said newspaper at least once in each of the twelve weeks immediately preceding the day of sale specified in said notice of sale ; said publication having been commenced on the 17th day of December, 1886, and ending on the 11th day of March, 1887.

(*Jurat.*)

(Signature.)

Form of Affidavit Service of Notice.

STATE OF NEW YORK, }
 ULSTER COUNTY, } ss.:

Sturgis Bulkley, of the town of Hardenbergh, county of Ulster, State of New York, being duly sworn, says : That he resides in said town of Hardenbergh ; that on the 18th day of December, 1886, this deponent served a copy of the said notice on each of the several

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persons next hereinafter named, by depositing a copy of the said notice in the postoffice hereinafter stated, properly inclosed in a postpaid wrapper, directed to the persons to be served, at their respective places of residence, to wit : To the several persons next hereinafter named, and at and to the postoffices set opposite their names respectively, as hereinafter stated ; that on the day last aforesaid this deponent deposited all of said notices so inclosed and directed as aforesaid, in the postoffice at Hardenbergh, where said Sturgis Bulkley resided, and paid the full legal postage on each of them.

That at the time said notices were so deposited in the postoffice at Hardenbergh there was a regular communication by mail at least once in each week between said Hardenbergh postoffice and each of the other postoffices to which said notices were directed, and that at the time each of the said persons resided at the respective places to which their said notices were so directed. That the names and the direction of said notices to them as aforesaid were respectively as follows, to wit : (Here insert names, direction.) Deponent further says that at the times and the places hereinafter named, he served personally a copy of said notice of foreclosure and sale on the following persons, viz. : (Here insert names, place of service, and date of service), by delivering a copy of the same to each of said persons personally, and leaving the same with each of them.

(*Jurat.*)

(Signature.)

It was held previous to the Revised Statutes that the omission to record power of sale before conveyance did not vitiate the sale. *Wilson v. Troup*, 2 Cow. 145; *Jackson v. Colden*, 4 id. 266. It is held, in *Layman v. Whiting*, 20 Barb. 559, and *Bryan v. Butts*, 27 id. 503, affirmed, 28 How. 582. that in order to maintain ejectment the affidavits must be filed and recorded. But see *Howard v. Hatch*, 29 Barb. 297 ; *Arnot v. McClure*, 4 Denio, 41 ; *Cohoes Co. v. Goss*, 13 Barb. 138. But the filing and recording of the affidavits is not necessary as against the mortgagor's equity of redemption, which is barred and foreclosed by the proceedings. *Tuthill v. Tracy*, 31 N. Y. 157. The omission to record does not invalidate the purchaser's title, so held under Revised Statutes. *Howard v. Hatch*, 29 Barb. 297. Where there has been a sale pursuant to a power under the statute, the equity of redemption of the mortgaged premises is thereby foreclosed, though the affidavit of publication of notice of sale and of the posting thereof be not made and recorded as required by statute for twenty years thereafter. The right of the mortgagor to redeem is terminated whenever there has been a sale of the mortgaged premises, regularly made and pursuant to the power contained in the mortgage or under a decree of sale. *Tuthill v. Tracy*, 31 N. Y.

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157. This case is cited in *Osborn v. Merwin*, 12 Hun, 332, and it is there held that a sale had under a foreclosure by advertisement pursuant to the statute bars the equity of redemption although no affidavits are made. The character of common-law evidence necessary is there pointed out, and *Hawley v. Bennett*, 5 Paige 104, and *Guy v. Mead*, 22 N. Y. 462, are referred to as authority. The facts necessary to be proven by affidavit, the right to supply defects by parol, and the character of parol evidence to show the facts are discussed in *Mowry v. Sanborn*, reported on three appeals to the Court of Appeals in 65 N. Y. 581, 68 id. 153, and 72 id. 534. Also below, 62 Barb. 223, 7 Hun, 380, 11 id. 545, and the reported cases referred to and collated ; see, also, *Story v. Hamilton*, 86 N. Y. 428, affirming 20 Hun, 133.

Note by Clerk upon Margin of Record of Mortgage.

The affidavits of sale of the property described in this mortgage are recorded in book No. 203 of mortgages, at page 46.

Dated April 5, 1886.

J. D. WURTS,
Clerk.

As to § 2400, the codifiers say that additions to this section have been made so as to express the meaning of the statute as expounded by recent decisions. They say further : "It was held in *Layman v. Whiting*, 20 Barb. 559, and *Bryan v. Butts*, 27 id. 503, following the authority of *Arnot v. McClure*, 4 Denio, 41, that in the absence of a conveyance the legal title does not pass to the purchaser so as to enable him to maintain ejectment until the affidavits are made and recorded." And in *Cohoes Co. v. Goss*, 13 Barb. 127, it was said that no title passes to the purchaser unless the affidavits are recorded. But in *Howard v. Hatch*, 29 Barb. 297, and *Chalmers v. Wright*, 5 Robt. 713, it was decided that the legal title passes upon the sale, and that the recorded affidavits are not the only competent evidence of the sale. See, also, *Tuthill v. Tracy*, 31 N. Y. 157, holding that the mortgage is foreclosed by the sale prior to the recording of the affidavit.

If the purchaser be not the person authorized to execute the power of sale, he obtains a good title upon payment of the purchase money and on compliance with the terms of sale, without filing and recording the affidavits, though he is not bound to pay the purchase money until the affidavits are filed

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or delivered, or tendered to him for filing. *Cowdrey v. Turner*, 85 Hun, 452, 32 Supp. 890, 66 St. Rep. 208.

ARTICLE IV.

COSTS. §§ 2401, 2402, 2403.

§ 2401. Costs allowed.

The following costs, in addition to the expenses specified in the next section, are allowed in proceedings taken as prescribed in this title :

1. For drawing a notice of sale, a notice of the postponement of a sale, or an affidavit, made as prescribed in this title, for each folio, twenty-five cents ; for making each necessary copy thereof, for each folio thirteen cents.

2. For serving each copy of the notice of sale, required or expressly permitted to be served by this title, and for affixing each copy thereof, required to be affixed upon the courthouse, as prescribed in this title, one dollar.

3. For superintending the sale, and attending to the execution of the necessary papers, ten dollars.

2 R. S. 652, § 4, sub. 1 and 2, and part of sub. 3 (2 Edm. 672), and L. 1844, ch. 346, § 3 (4 Edm. 668).

§ 2402. Expenses allowed.

The sums actually paid for the following services, not exceeding the fees allowed by law for those services, are allowed in proceedings, taken as prescribed in this title :

1. For publishing the notice of sale, and the notice or notices of postponement, if any, for a period not exceeding twenty-four weeks.

2. For the services specified in § 2390 of this act.

3. For recording the affidavits ; and also, where the property sold is situated in two or more counties, for making and recording the necessary certified copies thereof.

4. For necessary postage and searches.

§ 2403. Taxation thereof.

The costs and expenses must be taxed, upon notice, by the clerk of the county where the sale took place, upon the request and at the expense of any person interested in the payment thereof. Each provision of this act, relating to the taxation of costs in the Supreme Court, and the review thereof, applies to such a taxation.

One who claims the surplus as heir at law of the mortgagor, and has been recognized as such, is entitled to require taxation. *Matter of Moss*, 6 Hun, 263. Services not mentioned in the statute cannot be taxed although actually necessary, but one who obtained an injunction restraining the sale but allowed the continuation of the notice of publication, cannot on taxation object to the allowance of the whole expense of publication although it exceeded the statutory time. *Collins v. Standish*, 6 How. 493. Where the mortgagee omitted to notify certain necessary parties, and for that reason postponed the sale, it was held he could not tax costs of the sale first attempted. *Hornby v. Cramer*, 12 How. 490.

Art. 4. Costs.

In taxing costs in such proceeding, matter inserted in the notice, which was not required by the statute, should not be considered in determining the number of folios to be allowed, nor should a charge be allowed for serving notices on persons not required by the statute to be served. A charge for drawing notices and for a copy to keep is proper, as is also a copy for the printer, and printed copies may be charged for. As one printed notice is sufficient for two or more affidavits, under § 2397, there is no necessity for more than one, to which the several affidavits may be attached, and that one will be allowed, for a charge cannot be made for a copy served on the auctioneer, but it is proper to charge for thirteen weeks' publication. Devisees under the recorded will of a deceased mortgagor, and a lessee under a recorded lease, may be deemed grantees, who should be served with notice, and where such devisees are minors under fourteen years of age, a notice is also properly served on their guardian, which may be charged for. *Ferguson v. Woolley*, 9 Civ. Pro. 236.

Bill of Costs on Foreclosure by Advertisement.

Notice of sale, ten folios, at 25 cents.....	\$2 50
Copy same, to keep, at 13 cents.....	1 30
Copy, notice for printer, at 13 cents.....	1 30
Copy for notice for posting on court-house door.....	1 30
Expense of posting.....	1 00
Affidavit of posting, two folios and copy, at 25 cents.....	50
Copy, notice annexed, at 13 cents.....	13
Clerk's fees on same.....	50
Affidavit of posting in clerk's office, two folios and copy, at 13 cents.....	52
Printer, publishing notice, thirteen insertions, ten folios....	43 50
Printer, publishing two postponements of sale, two folios..	3 00
Printer, publishing one additional insertion, notice of sale..	2 50
Affidavit of publication, two folios and a copy, at 13 cents..	52
Copying notice annexed, at 13 cents....	1 30
Copy of notice to serve on mortgagor, at 13 cents.....	1 30
Serving ten notices.....	10 00
Affidavit of service, two folios, at 38 cents.	76
Copying notice annexed, five folios, at 13 cents.....	1 30
Postage.....	50
Clerk's fees for search.....	8 00
Affidavit of circumstances of sale, four folios and copy, at 38 cents.....	3 04
Copy, printed notice annexed.....	1 35
Superintending sale... ..	10 00
Recording affidavits.....	4 00
Oaths of five affidavits, at 10 cents.....	50

 Art. 5. Surplus Money and Proceedings with Regard Thereto.

ULSTER COUNTY, SS. :

Virgil B. Van Wagoner, of the city of Kingston, said county, being duly sworn, says that he is attorney for Charles Van Brunt, the assignee of the mortgage executed by Joseph Reil to John Q. Adams, and which has been foreclosed under the statute.

That according to the best of deponent's knowledge and belief, the several disbursements charged in the bill of costs hereto annexed have been actually and necessarily paid or incurred ; that the copies of papers charged for therein were actually and necessarily used or obtained for use ; that such bill of costs contains no charge for any draft or copy of any affidavit or other paper which has not been made, or for any other service which has not been performed, except such services as are allowed by law to be taxed prospectively, and that the number of folios contained in the draft or in the copies of said papers are not overcharged in such bill.

(*Jurat.*)

(Signature.)

ARTICLE V.

SURPLUS MONEY AND PROCEEDINGS WITH REGARD THERETO.

§§ 2404, 2405, 2406, 2407, 2408.

§ 2404. Surplus money to be paid into Supreme Court.

An attorney or other person who receives any money arising upon a sale made as prescribed in this title, must, within ten days after he receives it, pay into the Supreme Court the surplus, exceeding the sum due and to become due upon the mortgage, and the costs and expenses of the foreclosure, in like manner and with like effect as if the proceedings to foreclose the mortgage were taken in an action brought in the Supreme Court, and triable in the county where the sale took place.

L. 1868, ch. 804, §§ 1, 2, and 4 (7 Edm. 353) ; L. 1870, ch. 706, § 1 (7 Edm. 770) ; see §§ 743, 745.

§ 2405. Claimant of surplus money to file petition.

A person who had, at the time of the sale, an interest in or lien upon the property sold, or a part thereof, may, at any time before an order is made, as prescribed in the next section but one, file in the office of the clerk of the county, where the sale took place, a petition stating the nature and extent of his claim, and praying for an order directing the payment to him of the surplus money or part thereof.

Id. part of § 3, am'd.

§ 2406. Application for surplus money.

A person filing a petition, as prescribed in the last section, may, after the expiration of twenty days from the day of sale, apply to the Supreme Court, at a term held within the judicial district, embracing the county where his petition is filed, for an order, pursuant to the prayer of his petition. Notice of the application must be served, in the manner prescribed in this act for the service of a paper upon an attorney in an action, upon each person, who has filed a like petition, at least eight days before the application ; and also upon each person, upon whom a notice of sale was served, as shown in the affidavit of sale, or upon his executor or administrator. But, if it is shown to the court, by affidavit, that service upon any person, required to be served, cannot be so made with due diligence, notice may be given to him in any manner which the court directs.

L. 1868, ch. 804, part of § 3, am'd.

Art. 5. Surplus Money and Proceedings with Regard Thereto.

§ 2407. Order for distribution.

Upon the presentation of the petition, with due proof of notice for application, the court must make an order referring it to a suitable person to ascertain and report the amount due to the petitioner, and to each other person, which is a lien upon the surplus money; and the priorities of the several liens thereupon. Upon the coming in and confirmation of the referee's report, the court must make such an order, for the distribution of the surplus money, as justice requires.

Id. remainder of § 3, am'd.

§ 2408. Limitation of last four sections.

The last four sections do not apply to surplus money, arising upon the sale of real property, of which a decedent died seized, where letters testamentary or letters of administration, upon the decedent's estate, were, within four years before the sale, issued from a surrogate's court within the State, having jurisdiction to issue them.

L. 1867, ch. 658 (7 Edm. 142); L. 1870, ch. 170 (7 Edm. 664); and L. 1871, ch. 834 (9 Edm. 210); see, also, § 2798.

The provisions of §§ 2798 and 2799 are as follows :

§ 2798. Where real property, or an interest in real property, liable to be disposed of as prescribed in this title, is sold, in an action or a special proceeding, specified in the last section, to satisfy a mortgage or other lien thereupon which accrued during the decedent's lifetime, and letters testamentary or letters of administration upon the decedent's estate were, within four years before the sale, issued from a surrogate's court of the State having jurisdiction to grant them, the surplus money must be paid into the surrogate's court from which the letters issued. If the sale was made pursuant to the directions contained in a judgment or order, the surplus remaining after payment of all the liens upon the property, chargeable upon the proceeds, which existed at the time of the decedent's death, must be so paid. If the sale was made in any other manner, the surplus exceeding the lien to satisfy which the property was sold, and the costs and expenses, must, within thirty days after the receipt of the money from which it accrues, be so paid over by the person receiving that money. The receipt of the surrogate, or the clerk of the surrogate's court, or the county treasurer, as the case may be, is a sufficient discharge to the person paying the money.

§ 2799. Where money is paid into a surrogate's court, as prescribed in the last section, and a petition for the disposition of property, as prescribed in this title, is pending before him; or is presented at any time before the distribution of the money; the money must be distributed as if it was the proceeds of the decedent's real property, sold pursuant to the decree. If such a petition is not pending or presented, or if a decree for the disposition of the decedent's property is not made thereupon, a verified petition, praying for a decree directing the distribution of the money among the persons entitled thereto, may be presented by any of those persons. Each person who would be entitled to share in the distribution of the proceeds of a sale must be cited to show cause why such a decree should not be made. Service of the citation may be made upon all the persons designated therein, by publishing the same in two newspapers designated as prescribed in article first of title second of this chapter, at least once in each of the four successive weeks immediately preceding the return day thereof, except that personal service must be made upon the husband, wife, heirs, and devisees of the decedent, and also upon every other person claiming under them, or either of them, who resides in this State. Upon the return of the citation the rights and priorities of the persons interested must be established, and a decree for distribution must be made, as if it was the proceeds of real property sold.

 Art. 5. Surplus Money and Proceedings with Regard Thereto.

Petition for Payment of Surplus Moneys.

To the Supreme Court :

The petition of John Mills, of the city of Kingston, respectfully shows that heretofore proceedings were taken by Charles Van Brunt, pursuant to title 9 of chapter 17 of the Code of Civil Procedure, for the sale of the real property described as follows, to wit (describe the same), in foreclosure of a mortgage executed by Joseph Reil to John Q. Adams, dated January 28, 1883, and recorded in Ulster County clerk's office on the 2d day of August, 1883, at 1.30 o'clock in the afternoon in book No. 166 of mortgages, at page 61, and a sale of said property was made in said proceedings on the 25th day of March, 1886.

That a surplus remained of the proceeds of said sale amounting to \$400 over and above the sum due, and to grow due upon said mortgage and the costs and expenses of the said foreclosure, and that on the 10th day of April, 1886, the attorney for the assignee of said mortgage, by whom said mortgage was foreclosed, paid into this court and to the county treasurer of Ulster County the said surplus.

And your petitioner further shows, that at the time of said sale he had an interest in, or lien upon, the said property, said interest or lien being by reason of (state nature of interest or lien); and your petitioner claims that he is entitled to said surplus moneys, by reason of his said interest in, or lien upon, said property. And your petitioner prays for an order of this court directing the payment to him of said surplus moneys, or of so much of said surplus moneys as may be necessary to satisfy his said interest or lien.

Dated _____

(Signature.)

(Add verification.)

Notice of Motion for Surplus Moneys.

(Title of proceeding.)

SIRS,—Take notice that the undersigned will apply at, etc., on, etc., for an order pursuant to the prayer of his petition, filed in the Ulster County clerk's office on the 20th day of May, 1886, directing the payment to him of the surplus moneys arising upon the sale of the property described in the said petition, a copy of which is herewith served upon you, and for such other and further relief as may be proper.

Yours, etc.,

Dated _____

WM. D. BRINNIER,

To _____

Attorney for Petitioner.

Order of Reference as to Surplus Moneys.

(Caption usual form.)

(Title of proceeding.)

Upon the presentation of the petition of John Mills, dated May 10, 1886, which was filed in the Ulster County clerk's office on the

 Art. 5. Surplus Money and Proceedings with Regard Thereto.

10th day of May, 1886, with proof of due service of notice of this application upon each person who has filed a like petition, and also upon each person upon whom a notice of sale was served, as was shown in the affidavit of sale, and on motion of Wm. D. Brinnier, attorney for the said petitioner, and after hearing, etc., and on reading (name opposing papers).

It is hereby ordered, that S. T. Hull, Esq., of Kingston, counsellor-at-law, be and he hereby is appointed referee, to ascertain and report the amount due to the petitioner and to each other person, which is a lien upon the surplus money mentioned in said petition of John Mills and the priorities of the several liens thereupon.

WM. L. LEARNED,
Justice Supreme Court.

Form for Report of Referee as to Priority of Liens, etc.

(Title of proceeding.)

I, the undersigned referee, appointed by order of this court, dated May 20, 1886, to ascertain and report the amount due to John Mills, the petitioner in this proceeding, and to each other person, which is a lien upon the surplus moneys arising upon the sale of the premises described in the said petition and the priority of the several liens thereupon, do respectfully report (proceed substantially as in report in foreclosure by suit, making necessary changes to suit the case).

Dated June 12, 1886.

(Signature of referee.)

Order upon Report of Referee.

(Title of proceeding.)

(Caption.)

On reading and filing the report, dated June 12, 1886, of S. T. Hull, Esq., referee, appointed herein by order of this court, dated May 20, 1886, from which it appears that John Mills is entitled to the whole of the surplus moneys arising upon the sale of the real property described in his petition, filed in the Ulster County clerk's office, on the 10th day of May, 1886, which surplus has been paid into court and to the county treasurer of Ulster County (or make other recitals according to the report), and it appearing that due notice of this motion has been given to (name parties served):

Now, on motion of Wm. D. Brinnier, Esq., counsel for said petitioner, and after hearing, etc., (or no one appearing to oppose), and on reading (name any other motion papers):

It is hereby ordered that the said report be and the same is hereby confirmed, and that said county treasurer pay, etc. (here insert provisions for distribution as may be required).

WM. L. LEARNED,
Justice Supreme Court.

Where a mortgage, payable in instalments, is foreclosed for

Art. 5. Surplus Money and Proceedings with Regard Thereto.

the amount due, subject to future instalments, the land becomes the primary fund for the future payments, and the mortgagor is entitled to the surplus on the sale. *Cox v. Wheeler*, 7 Paige, 248. After foreclosure the mortgagee is not liable, as trustee, to the holders of subsequent liens for the surplus, if he has received only the amount due him on the mortgage and the expenses of foreclosure, leaving the surplus in the hands of the purchaser who asserts a claim thereto. The mortgagee's liability is to the mortgagor and those who represent him, and a purchaser who claims and retains the surplus, as holder of the second mortgage lien, is liable to a subsequent judgment creditor for the balance of the surplus after deducting the amount of his own lien, but it is not liable for interest on such balance until after notice or demand by the party entitled to it. *Russell v. Duflon*, 4 Lans. 399. A subsequent incumbrancer, with no notice of the foreclosure, has no claim to surplus moneys on the sale, his lien not having been affected, unless he releases to the purchaser all claim on the equity of redemption. *Walker v. Harris*, 7 Paige, 167; *Winslow v. McCall*, 32 Barb. 241. Although the receipt by the mortgagor, or his representative, of the surplus moneys arising on the sale may not estop him from questioning the regularity of the proceedings, it would seem to be evidence to be considered in passing on the question. *Candee v. Burke*, 1 Hun, 546. It is a defence by a mortgagee who has sold under the statute, when sued for the surplus by the mortgagor's grantee, that the former had a lien on the land equal to the surplus. *Eddy v. Smith*, 13 Wend. 488. Where property has been sold upon terms stated publicly at the sale, though not included in the published notice, the mortgagor cannot affirm the sale as to the price bid when made upon the terms stated, and then repudiate the terms of sale and claim, as surplus money, which, by the terms of sale, was to be applied in payment of a former mortgage, as though no such terms controlled the action and bid of the mortgagee in bidding in the property. *Story v. Hamilton*, 20 Hun, 133, affirmed, 86 N. Y. 428.

Art. 6. Loan Commissioners' Mortgages.

ARTICLE VI.

LOAN COMMISSIONERS' MORTGAGES. § 2409.

§ 2409. [Am'd, 1882.] Application of this title to mortgages to the State.

This title does not affect any provision of law, inconsistent therewith, especially relating to the foreclosure of mortgages to the people of the State, or to the commissioners for loaning certain moneys of the United States.

Section 15 of part 3, ch. 8, tit. 15, R. S., am'd.

The following decisions bear upon the rights and powers of loan commissioners, and the manner and validity of foreclosure by them under chapter 2, § 30, Laws 1837. The loan officers must strictly pursue the directions of the statute. If there be a defect in the notice or advertisement or conduct of sale, it is fatal to the sale. *Denning v. Smith*, 3 Johns. Ch. 332; *Sherman v. Dodge*, 6 id. 107; *Rogers v. Murray*, 3 Paige, 390; *Sherwood v. Reade*, 7 Hill, 431.

It seems that the provisions of § 2409 were adopted to exclude from the operation of the other sections of title 9, on foreclosures of mortgages of commissioners for loaning money of the United States, pursuant to § 5 of chapter 150 of Laws of 1837. *People v. Burdick*, 52 Hun, 352, 23 St. Rep. 432, 5 Supp. 365. The provisions of title 9 for foreclosure by advertisement do not supersede the special statutes regulating a foreclosure of loan commissioner's mortgage. Such mortgage is regulated by chapters 2 and 150 of the Laws of 1837; also, State constitution, Art. IX., § 1. *Barley v. Roosa*, 35 St. Rep. 901, 13 Supp. 209.

It was held, in *Dunn v. Ocean National Bank*, 61 N. Y. 497, that the statute as it then stood as to distribution of surplus by surrogate's court had only a limited scope, and was simply designed to provide a method for applying the surplus to the payment of debts. It made no change in the law as to the proper person considered as owner to bring an action for the surplus. The surplus is regarded as real estate, and the most careful precautions are taken to prevent the heirs from being deprived of it, except in the same manner as if the land had remained unsold. Affirming 6 Lans. 296. These provisions do not apply to sales on foreclosure by action. *German Savings Bank v. Shaver*, 25 Hun, 409.

The words, "within four years before the sale," § 2798, refer

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to the date of sale, and not to the commencement of proceedings resulting in a sale. *White v. Poillon*, 25 Hun, 69. A judgment creditor whose judgment was not a lien has no right to share in the distribution of the proceeds of sale of decedent's real estate on foreclosure. *Davis v. Davis*, 4 Redf. 355. In § 2799 the word "may" means "shall." Before the amendment of 1881 it was held that service by publication was the only mode of given jurisdiction. *Matter of Solomon*, 4 Redf. 509. As to disposition of surplus in a peculiar case, see *Lahrt v. Zahrt*, 1 Dem. 444.

A sale by one of two commissioners is void; both must be present and participate in the sale, and the deed by two cannot aid such a sale. Nor can one commissioner give valid notice of sale. Both must act in all official acts. *N. Y. Life Ins. Co. v. Staats*, 21 Barb. 570; *Powell v. Tuthill*, 3 N. Y. 396; *Olmstead v. Elder*, 5 id. 144. Former sales by one commissioner were confirmed by chapter 704, Laws of 1867. It is sufficient if the notice of sale is published for six successive weeks previous to the sale, although the first publication be less than forty-two days prior thereto. *Wood v. Terry*, 4 Lans. 80. A general description of the land in the notice was sufficient under statute of 1808. *Jackson v. Harris*, 3 Cow. 241.

The omission to name number of lot and name of mortgagor in notice is fatal, and it is said that posting notices in distant places or *inside* the court-house door will render the sale invalid. Notice must be published and posted for same length of time. *Denning v. Smith*, 3 Johns. Ch. 332; see, also, *King v. Stow*, 6 id. 323. The deed of the loan commissioners on an irregular sale, before the Revised Statutes, vests the legal title in the purchaser, *Brown v. Wilbur*, 8 Wend. 657; *Rogers v. Murray*, 3 Paige, 390. As to place of sale, where new county has been erected, see *People v. Supervisors of Delaware*, 5 Cow. 436; *Rogers v. Murray*, 3 Paige, 390. The manner of sale and method of conveyance are prescribed in *York v. Allen*, 30 N. Y. 104. The advertisement of sale must indicate who gave the mortgage, and to whom, clearly, and commissioners, in case of default, become seized as trustees, only subject to the possession and right of the mortgagor to redeem, until a legal sale is made in conformity with the statute. *Thompson v. Commissioners*, 79 N. Y. 54. The commissioners cannot make it one of the terms of sale that the purchaser shall

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pay down a part instead of the whole, and that in default of payment there shall be a resale. *Sherwood v. Reade*, 7 Hill, 431. As to when a default amounted to a foreclosure under the statute of 1808, and as to a conditional right to redeem under that statute, see *Jackson v. Voorkees*, 9 Johns. 129; *Sherrill v. Crosby*, 14 id. 358; *Jackson v. Rhodes*, 8 Cow. 47. Upon default for twenty-three days the mortgagor's interest is absolutely gone; the foreclosure provided for by statute is equivalent to a decree. The right to redeem is not an equity of redemption nor an interest in the land, but a special right to be availed of in the manner provided by statute. *Pell v. Ulmar*, 18 N. Y. 139. Application to redeem must be before the lapse of twenty-three days. *Fellows v. Commissioners of Oneida*, 36 Barb. 655. The statute as to entry of proceedings in the mortgage book is directory. *Wood v. Terry*, 4 Lans. 80. And when both the commissioners are present and unite in making a sale, the fact that the entry in the minute-book, purporting to be the entry of both, was made by one and signed by one, is not a fatal irregularity. *White v. Lester*, 1 Keyes, 316.

The power of sale is not exhausted by one sale. If the foreclosure is set aside by a court, a second foreclosure may be had. *Stackpole v. Robbins*, 48 N. Y. 665. The validity of the sale to a *bona fide* purchaser is not affected by the omission of the commissioners to enter in the minute-book the order for and copy of the advertisement of sale, and designation of the places where, and persons by whom, advertisements were posted. *White v. Lester*, 1 Keyes, 316; *Rowell v. Tuthill*, 3 N. Y. 396. Entry of mortgage on books of commissioners, out of order and under wrong date, and on wrong page, is not notice to subsequent mortgagees in good faith. *N. Y. Life Ins. Co. v. White*, 17 N. Y. 469. If the mortgagor purchases and gives a new mortgage it is a purchase-money mortgage. On a subsequent default the commissioners hold as against one who has acquired title under a judgment docketed intermediate the two mortgages. *Commissioners v. Chase*, 6 Barb. 37; see Opinions of Attorneys-General, 164. The requirement as to two witnesses to a deed is directory. *Id.* Equity cannot set aside a sale merely for hardship or inadequacy of price. *Marsh v. Ludlum*, 3 Sandf. Ch. 35; *Rogers v. Murray*, 3 Paige, 390. Commissioners are limited to the fees fixed by statute, and cannot tax fees as attorneys. *Commissioner of Ulster v. Van Dermark*, 36 How. 145. Where a sale by loan

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commissioners was illegal and void the mortgagor may bring an action to redeem, and for rents and profits. In such a case the omission to make tender is not fatal to the action, but at most only affects the question of costs. *Thompson v. Loan Commissioners*, 79 N. Y. 54. Loan commissioners have no power to sell a mortgage taken by them, and moneys paid to them in pursuance of an agreement to sell cannot be applied either as upon a purchase or in payment of such mortgage. *Woodgate v. Fleet*, 44 N. Y. 1.

CHAPTER XXII.

PROCEEDINGS TO CHANGE THE NAME OF AN INDIVIDUAL OR CORPORATION.

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ARTICLE I.

THE PETITION AND NOTICE. §§ 2410, 2411, 2412, 2413.

§ 2410. [Am'd, 1895.] **Petition by individual.**

A petition for leave to assume another name may be made by a resident of the State to the county court of the county in which he resides, or, if he resides in the city of New York, either to the Supreme Court, or to the city court of New York. The petition of an infant shall be made by his general guardian, or by the guardian of his person, or by his next friend.

L. 1895, ch. 946.

§ 2411. **Petition by corporation.**

A petition to assume another corporate name may be made by a domestic corporation, whether incorporated by a general or special law, to the Supreme Court at a Special Term thereof, held in the judicial district in which its principal business office shall be situated, or, if it be other than a stock corporation, at a Special Term held in the judicial district in which its certificate of incorporation is filed or recorded, or in which its principal property is situated, or in which its principal operations are or theretofore have been conducted. If it be a banking, insurance, or railroad corporation, the petition must be authorized by a resolution of the directors of the corporation, and approved if a banking corporation, by the superintendent of banks; if an insurance corporation, by the superintendent of insurance, and if a railroad corporation, by the board of railroad commissioners. The petition to change the name of any other corporation must have annexed thereto a certificate of the secretary of State, that the name which such corporation proposes to assume is not the name of any other domestic corporation or a name which he deems so nearly resembling it, as to be calculated to deceive.

§ 2412. **Contents of petition.**

The petition must be in writing, signed by the petitioner and verified in like manner as a pleading in a court of record, and must specify the grounds of the application, the name, age, and residence of the individual whose name is proposed to be

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changed, and the name which he proposes to assume, and if the petitioner be a corporation, its present name, and the name it proposes to assume, which must not be the name of any other corporation, or a name so nearly resembling it as to be calculated to deceive; and if it be a railroad corporation, a corporation having banking powers or the power to make loans upon pledges or deposits, or to make insurances, that the petition has been duly authorized by a resolution of the directors of the corporation and approved by the proper officer.

§ 2413. [Am'd, 1894.] Notice of presentation of petition.

If the petition be to change the name of an infant, and is made by the infant's next friend, notice of the time and place at which the petition will be presented must be served upon the father, or if he is dead or cannot be found, upon the mother, or if both are dead or cannot be found, upon the general guardian or guardian of the person of the infant, in like manner as a notice of a motion upon an attorney in an action, unless it appears to the satisfaction of the court that the infant has no father or mother, or that both reside without the State or cannot be found, and that he has no guardian residing within this State, in which case the court may dispense with notice or require notice to be given to such persons and in such manner as the court thinks proper. If the petition be made by a corporation located elsewhere than in the city and county of New York, notice of the presentation thereof shall be published once in each week for six successive weeks in the State paper (at Albany, in which notices by State officers are authorized by law to be published), and in a newspaper of every county in which such corporation shall have a business office, or if it has no business office, of the county in which its principal corporate property is situated or in which its operations are or theretofore have been principally conducted, which newspaper, if it be a banking corporation, shall be designated by the superintendent of banks, if any insurance corporation by the superintendent of insurance, or if a railroad corporation, by the railroad commissioners. In the city and county of New York such notice shall be published once in each week for six successive weeks in two daily newspapers published in such county.

L. 1894, ch. 264.

In *Petition of John Snook*, 2 Hilt. 566, Judge Daly examines the origin of proper names and the law respecting the use of them. It is said that the law supposes every person to have two names, one in the family, the other the given name. A separate single letter is not a name. *Frank v. Levie*, 5 Robt. 599. But it is held in *Lynch v. Tomlinson*, Abbott's Annual, 1884, that a person may have an initial as a name. The law recognizes but one Christian name, so that an error in the middle name may be struck out as surplusage; the middle name is no part of the name. *Van Voorhis v. Budd*, 39 Barb. 479; *Milk v. Christie*, 1 Hill, 102. Where circumstances tended to show that the same person was intended, it was held that the insertion of a middle name in an indorsement was not such a variance as to authorize the inference that a different person was intended. *Arnold v. National Bank*, 3 T. & C. 769. But it is said in *Kortz v. Canvassers of Greene*, 12 Abb. N. C. 86, that the rule that the middle letter is no part of a man's name, and may be regarded as surplusage, and that

Art. 1. The Petition and Notice.

the law recognizes but one Christian name, has no application in the case of variations in the middle initials in ballots at an election. One may legally name himself, or change his name, or acquire a name by reputation, general usage, and habit. *Matter of Petition of Snook*, 2 Hilt. 566; *England v. New York Publishing Co.*, 8 Daly, 375. And a plaintiff may sue by the name by which she is generally known, though she may have another. *Frebing v. Vetter*, 12 Abb. N.C. 303. Where a name appears to be a foreign one, a variance of a letter, which according to the pronunciation of that language does not change the sound, is not a misnomer. *Jackson v. Prevost*, 2 Caines, 164. As to misnomers, see 1 City Court Rep'r, 115, in note to *Stubert v. Schuarts*. If a man be known by the name of "Junior" to his name, an indictment against him without that addition is not conclusive that he was not the person indicted, if found by special verdict that he was the person meant. If names are identical, it is *prima facie* evidence that the persons are the same from identity of name, but not from identity of initials and surname. *People v. Smith*, 45 N. Y. 772. The name by which a taxpayer is generally known, although not his real one, may be entered on assessment roll, and he will be bound thereby. *Van Voorhis v. Budd*, 39 Barb. 479. In *Booth v. Jarrett*, 52 How. 169, it was said that injunction would not be granted restraining the use of a person's name as applied to a theatre when it had been mortgaged and sold under that name.

On petition to change the name of a person, it must appear whether he is married or single, whether there are any judgments against him, or actions pending; whether there is any outstanding commercial paper in the name sought to be abandoned, and also his age and birthplace, and the names of his parents. *Matter of Hamilton*, 10 Abb. N. C. 79. The decisions in *Petition of Snook*, 2 Hilt. 566, and *Matter of Ludwig*, 1 Law Bull. 14, requiring that pecuniary benefit must be shown as likely to result to petitioner, are rendered obsolete by the present section.

Form of Petition to Change Name of Individual.

To the County Court of the County of Ulster :

The petition of Abner Bush respectfully shows that he is of full age, to wit, of the age of twenty-one years and upwards, and resides in the town of Wawarsing, in the county of Ulster, in this State.

 Art. 1. The Petition and Notice.

That he desires to assume another name than that now held by him, and that the name which he proposes to assume is Cornelius Dunlap.

That the grounds for this application for such change of name are as follows, to wit (name same):

That he is married (or is unmarried.)

That there are no judgments rendered, or actions pending against him, or that the following actions and no others are pending against him, to wit (state them), and that the following judgments and no others, have been rendered against him, to wit (state them):

That the following commercial paper is outstanding in the said name sought to be abandoned by him, to wit (describe same), or that no commercial paper is outstanding in, etc.:

That your petitioner was born in the city of Syracuse, Onondaga County, State of New York, and the name of his father is John Bush, and that of his mother is Fanny Bush.

And your petitioner prays the order of this court granting leave to assume the name of Cornelius Dunlap in place of that of Abner Bush, his present name, pursuant to the provisions of title 10, chapter 17, of the Code of Civil Procedure, and for such further or other relief as may be proper.

Dated April 2, 1887.

ABNER BUSH.

(Add verification.)

Form for Petition by Infant.

To the County Court of Ulster County:

The petition of Jane Bull, an infant, by her general guardian, respectfully shows: That said Jane Bull is an infant, under the age of twenty-one years, and unmarried, and became of the age of thirteen years August 12, 1886, and that said infant resides in the town of Rosendale, in the county of Ulster, in this State; that the said Jane Bull desires to assume another name than that now held by her, and that the name which she proposes to assume is Martha Sanders: that the grounds for her application are (state same), and that your petitioner verily believes that the interests of said infant will be promoted by the change of her name as aforesaid; that the father of said infant is dead, and that Fanny Bull is the mother of said infant, and resides at Rosendale, in said county, and that Julius Dennison is the general guardian of said infant, and resides at Rosendale aforesaid. And your petitioner prays the order of this court granting leave to said infant to assume the name of Martha Sanders in place of that of Jane Bull, pursuant to statute.

(Verification by guardian.)

JANE BULL,
By JULIUS DENNISON,
Her Guardian.

Notice of Application by Corporation.

To All to Whom it May Concern:

NOTICE IS HEREBY GIVEN. That at a Special Term of the Supreme Court to be held at the county court-house in the city of New York

Art. I. The Petition and Notice.

on Monday, the 2d day of July, 1894, at 11 o'clock A. M., or as soon thereafter as petition can be heard, the United States Mortgage Company, a corporation created under that name by chapter 924 of the Laws of 1871 of the State of New York, will present a petition for the change of the name of said company, so that it shall thereafter be designated the United States Mortgage & Trust Company.

GEORGE W. YOUNG,
President.

ARTHUR TURNBULL,
Treasurer.

Petition by Corporation.

SUPREME COURT—OF STATE OF NEW YORK.

In the Matter of the Petition of the United States Mortgage Company for a change of name.	}	83 Hun, 573.
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To the Honorable the Supreme Court of the State of New York :

The petition of the United States Mortgage Company, a corporation of the State of New York, doing business in the city and county of New York, respectfully shows :

That your petitioner was incorporated by a special act of the legislature, known as chapter 924 of the Laws of 1871, and that its charter has been amended and its powers enlarged by chapters 226 and 274 of the Laws of 1894, with the effect that your petitioner is now endowed with all the powers of a trust company organized under the general statutes relating to said companies of the State of New York.

That your petitioner has been engaged in the business since the year 1871, having its principal office in the city of New York, and has invested very large sums of money from time to time in bonds and mortgages in various parts of the United States, and has issued its bonds which have been sold to very large amounts in the United States and in the Kingdom of Great Britain and in foreign countries.

That your petitioner since it has been conducting business has maintained its credit and has established reputation of a high character as a corporation, and has become widely and favorably known throughout the United States and the Kingdom of Great Britain and in foreign countries.

That it now proposes to enlarge the field of its business and to exercise the trust powers that it possesses, and in so doing it desires both to avail itself of its reputation and business standing that has been acquired and established under its present name, and also to signify to those who have dealings with it and to the general public that it possesses and intends to exercise such trust powers.

That the name which it desires to assume, to wit, United States Mortgage & Trust Company, in the judgment of your petitioner, will effect to preserve to it the advantage acquired by the use of its present name, and assist your petitioner in the acquisition and transaction of the trust business which it proposes to carry on.

 Art. 2. The Order and When to Take Effect.

That this petition to your honorable court for leave to thus change its name has been duly authorized by a resolution of the directors of the corporation, and has been approved by the superintendent of banks.

That notice of the presentation of this petition has been published according to law for six weeks prior to the presentation hereof in two daily newspapers published in the county of New York.

Your petitioner therefore respectfully asks of your honorable court an order authorizing your petitioner to assume the name of United States Mortgage & Trust Company on and after the 5th day of August, 1894.

And your petitioner will ever pray.

UNITED STATES MORTGAGE COMPANY.

GEORGE W. YOUNG,

President.

ARTHUR TURNBULL,

Treasurer.

Verification of Petition.

STATE OF NEW YORK, CITY AND }
COUNTY OF NEW YORK, } ss. :

Before me personally appeared George W. Young and Arthur Turnbull, both personally known to me, and the said George W. Young, known to be the president, and the said Arthur Turnbull, known to be the treasurer, of the United States Mortgage Company, and each for himself being duly sworn says that he has read the above petition and knows the contents thereof, and that the same are true.

And the said Turnbull further says that he is the treasurer of the said company and resides in the city and county of New York, that he knows the corporate seal of the said company, and that the seal affixed to the said petition is said corporate seal, and that it was thereto affixed by direction of the board of directors of the said company.

GEORGE W. YOUNG,
ARTHUR TURNBULL.

Sworn and subscribed to, etc.

ARTICLE II.

THE ORDER AND WHEN TO TAKE EFFECT. §§ 2414, 2415.

§ 2414. [Am'd, 1895.] Order.

If the court to which the petition is presented is satisfied thereby, or by the affidavit and certificate presented therewith, that the petition is true, and that there is no reasonable objection to the change of name proposed, and if the petition be to change the name of an infant, that the interests of the infant will be substantially promoted by the change, and if the petitioner be a corporation, that the petition has been duly authorized and that notice of the presentation of the petition, if required by law, has been made, the court shall make an order authorizing the petition to assume the

 Art. 2. The Order and When to Take Effect.

name proposed on the day specified therein, not less than thirty days after the entry of the order. The order shall be directed to be entered and the papers on which it was granted to be filed within ten days thereafter in the clerk's office of the county in which the petitioner resides if he be an individual, or in the office of the clerk of the city court of New York if the order be made by that court, or, if the petitioner be a corporation, in the office of the clerk of the county in which its certificate of incorporation, if any, shall be filed, or if there be none filed, in which its principal office shall be located, or if it has no business office in the county in which its principal property is situated, or in which its operations are or theretofore have been principally conducted, or in the office of the clerk of the county in which the special term granting the order is held; and, if the petitioner be a corporation, that a certified copy of such order shall, within ten days after the entry thereof, be filed in the office of the secretary of State; and also, if it be a banking corporation, in the office of the superintendent of banks, or if it be an insurance corporation, in the office of the superintendent of insurance, or if it be a railroad corporation, in the office of the board of railroad commissioners. Such order shall also direct the publication, within ten days after the entry thereof, of a copy thereof in a designated newspaper, in the county in which the order is directed to be entered, at least once if the petitioner be an individual, or if the petitioner be a corporation, once in each week for four successive weeks. The county clerk, in whose office an order changing the name of a corporation is entered, shall record the same at length in the book kept in his office for recording certificates of incorporation.

L. 1895, ch. 946.

§ 2415. [Am'd, 1894.] **When change to take effect.**

If the order shall be fully complied with, and within forty days after the making of the order, an affidavit of the publication thereof shall be filed and recorded in the office in which the order is entered, and in each office in which certified copies thereof are required to be filed, if any, the petitioner shall, on and after the day specified for that purpose in the order, be known by the name which is thereby authorized to be assumed, and by no other name. No proceedings heretofore had under sections two thousand four hundred and fourteen and two thousand four hundred and fifteen of the Code of Civil Procedure for the change of the name of a corporation, shall be invalid by reason of the non-filing of an affidavit of the publication of the order changing such name within twenty days from the date thereof.

L. 1894, ch. 264.

Precedent for Order Changing Name of Individual.

(Caption.)

(Title of proceeding.)

Upon reading and filing the petition of Abner Bush, of, etc., dated April 2, 1887, praying for leave to assume the name of Cornelius Dunlap in place of his present name, and on filing proof of due service of notice of the presentation of said petition at this time and place upon the proper parties, and on motion of W. S. Fredenburgh, counsel for said petitioner, and no one opposing, and the court being satisfied by said petition and affidavits that there is no reasonable objection to the petitioner assuming the name proposed:

It is hereby ordered that the said Abner Bush be and he is hereby authorized to assume the name of said Cornelius Dunlap in place of

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his present name, on the 1st day of July, 1887, upon his complying with the provisions of § 2415 of the Code of Civil Procedure, viz.: That they cause a copy of this order to be published within ten days after this order is made in The Kingston Daily Leader, a newspaper published in the county of Ulster, and that within twenty days after the making of this order he cause the papers upon which it was granted, and an affidavit of the publication thereof, as above directed, to be filed and recorded in the county clerk's office of the said county of Ulster, and that after the said requirements are complied with the said petitioner must, on and after the said 1st day of July, 1887, be known by the name which he is hereby authorized to assume, and by no other name.

In *Matter of the Application of United States Mercantile and Reporting Agency, Limited, for leave to change its name*, 115 N. Y. 176, it was held that the moving corporation has no absolute right to change the name, but the matter is in the discretion of the court, and its decision, where no abuse of the discretion is shown, is not reviewable in the Court of Appeals. It seems that where no objections whatever existed, or one which furnished any reason for a refusal of the application, the Court of Appeals might interfere. But where the objections as to the reasonableness of which judgments might fairly differ the decision below is conclusive.

Such an order should not be granted where there is a danger of confusion by reason of the similarity of names with that of an existing corporation, and the fact that such confusion might arise forms a reasonable ground for a refusal to grant the petition. *Matter of Manhattan Dispensary*, 7 St. Rep. 871.

Where there are two bodies claiming the same name, and one of which had obtained the name on petition under this title, the order granting the change of name will be vacated where the petition did not set forth the exact fact with respect to the two bodies claiming the same name, though there is no provision of the Code expressly giving the court power to revoke or vacate its order authorizing a change of name, yet, such power is inherent, for courts of record by common law have absolute control of their own orders and judgments and power to modify or vacate them whenever it is required in the interests of justice. *Matter of Abyssinia Baptist Church*, 37 St. Rep. 766, 13 Supp. 920.

Prior to the amendment of the Code in 1893 the power to authorize the change of name of a trust company was vested exclusively in the superintendent of banks. Where a corpora-

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tion seeks to change its name so as to read "United States Mortgage and Trust Company," such application will not be denied on the ground that the proposed name so nearly resembles "United States Trust Company of New York" as to deceive persons as to the identity of such corporation. It seems that the word "trust" is a general word, and as it indicates a character, quality, or composition of a thing, it may not be appropriated by any one for his exclusive use, and thus the petitioner having a right to do a trust business has a right to use an appropriate name and cannot be required to invent a new one. Being a trust company it has a right to signify the fact by the only word that truly and clearly expresses it. *Matter of United States Mortgage Co.*, 65 St. Rep. 134, 83 Hun, 573.

ARTICLE III.

MISCELLANEOUS REGULATIONS. §§ 2416, 2417.

§ 2416. Substitution of new name in pending action or proceeding.

An action or special proceeding, civil or criminal, commenced by or against a person whose name is so changed, shall not abate, nor shall any relief, recovery, or other proceeding therein be prevented, impeded, or impaired in consequence of such change of name. The plaintiff in the action or the party instituting the special proceeding, or the people, as the case requires, may, at any time, obtain an order amending any of the papers or proceedings therein, by the substitution of the new name, without costs and without prejudice to the action or proceeding.

§ 2417. Reports by clerks to State officers.

The clerk of each county and of each court shall annually, in the month of December, report to the secretary of State all changes of names of individuals or of corporations, which have been made in pursuance of orders filed in their respective offices during the past year and since the last previous report, and also report in like manner to the superintendent of banks all changes of the names of banking corporations, and to the superintendent of insurance all changes of names of corporations authorized to make insurances. The secretary of State must cause to be published, in the next volume of the session laws, a tabular statement showing the original name of each person and corporation and the name which he or it has been authorized to assume.

CHAPTER XXIII.

PROCEEDINGS FOR THE VOLUNTARY DISSOLUTION OF A CORPORATION.

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ARTICLE I.

WHEN DISSOLUTION CAN BE HAD. §§ 2419, 2420.

§ 2419. [Am'd, 1895.] When a majority of directors, etc., may petition for dissolution.

If a majority of the directors, trustees, or other officers, having the management of the concerns of a corporation created by or under the laws of the State, discover that the stock, effects, and other property thereof are not sufficient to pay all just demands, for which it is liable, or to afford a reasonable security to those who may deal with it; or if, for any reason, they deem it beneficial to the interests of the stockholders, that the corporation should be dissolved; they may present a petition to the Supreme Court, praying for a final order dissolving the corporation, as prescribed in this title.

2 R. S. 467, § 58 (2 Edm. 488); L. 1895, ch. 946.

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§ 2420. [Am'd, 1894, 1896.] Id.; when they are equally divided.

If a corporation, created under a general statute of the State for the formation of corporations, or under any special act or charter, has an even number of trustees or directors, who are equally divided respecting the management of its affairs, or if the stock of such corporation is equally divided into not more than two independent ownerships or interests, or if the entire stock of the corporation is, at that time, owned by the trustees, or directors, who are even in number or equally divided, representing the management of its affairs, or if the stock is so divided, that one-half thereof is owned or controlled by persons favoring the course of part of the trustees or directors, and one-half thereof is owned by persons favoring the course of the other trustees or directors, the trustees, or directors, or the stockholders, or one or more of them, may present a petition as prescribed in the last section. And it shall be the duty of a majority of the directors or trustees of every corporation created by or under the laws of this State to present a petition as prescribed in the last section whenever directed so to do by a majority in interest of its stockholders. But this section does not apply to a savings bank, a trust company, a safe deposit company, or a corporation formed to rent safes in burglar and fireproof vaults, or for the construction or operation of a railroad, or for aiding in the construction thereof, or for carrying on the business of banking or insurance, or intended to derive a profit from the loan or use of money.

L. 1894, ch. 304; L. 1896, ch. 569. In effect Sept. 1, 1896.

The manner in which a corporation may be dissolved is said (1 Blackstone, Com. 485) to be either: First, by act of parliament; second, by the natural death of all its members; third, by surrender of its franchises; fourth, by forfeiture of its charter. The manner of dissolution of a corporation is classified in Am. and Eng. Enc. of Law: First, by expiration of the time limited in the charter; second, upon the happening of a contingency prescribed by the charter; third, by the surrender of the franchises to the State; fourth, by act of the legislature; fifth, by failure of an integral part of the corporation; sixth, by forfeiture of the franchise in a proper judicial proceeding. To the same effect Thompson on Corporations, § 6577; Spelling on Corporations, § 1008. The subject is very fully discussed in *People v. O'Brien*, 111 N. Y. 1, in an action brought by the attorney-general.

Under the provisions of the Code now under consideration, we are only concerned with the dissolution of the corporation by the voluntary surrender of its franchises through a judicial proceeding. This proceeding is entirely a matter of statute, and being special and statutory, must conform to the statute, although instituted in a court of general jurisdiction. *Chamberlain v. Rochester, etc., Co.*, 7 Hun, 557; *Matter of Westchester Iron Co.*, 15 How. 7. A court of equity has not, by virtue of its general

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and inherent powers, the right to dissolve the corporation, such right being entirely statutory. *Blivin v. Peru Iron & Steel Co.*, 9 Abb. N. C. 205.

Previous to the amendment of the Code in that respect, the court had no power to appoint a temporary receiver, or even to enjoin the bringing of suits against the corporation before the granting of the final order of dissolution. *Matter of French Mfg. Co.*, 12 Hun, 488; *Chamberlain v. Rochester, etc., Co.*, 7 Hun, 557; *Matter of E. M. Boynton Co.*, 34 Hun, 369; *Matter of Waterbury*, 8 Paige, 380. And previous to the enactment of § 57, chap. 932, Laws 1896, a corporation could not be dissolved by the action of its members or stockholders, but only by a judicial sentence or surrender of its charter accepted by the State. *N. Y. Marbled Iron Works v. Smith*, 4 Duer, 362; *Lake Ontario Bank v. Onondaga Bank*, 7 Hun, 549. By § 57 of the Stock Corporation Law a corporation can be dissolved by action of the board of directors.

The dissolution of a corporation is the termination of the existence of the corporate franchises conferred by the State upon the body of the corporators. Am. & Eng. Enc. of Law, vol. 4, p. 294. The dissolution of a corporation is that condition of law and fact which terminates the capacity of the body corporate to act as such, and necessitates a final liquidation and extinguishment of all the relations subsisting in respect to the corporate enterprise. Taylor on Corporations, 309.

A corporation can only be dissolved by a judicial sentence or a surrender of its charter accepted by the State. *Ex parte Reformed Presbyterian Church*, 7 How. 476; *New York Marbled Iron Works v. Smith*, 4 Duer, 362, and a corporation omitting to perform a duty imposed by its charter, or to comply with its provisions, does not *ipso facto* lose its corporate character. *Day v. Ogdensburg, etc., R. R. Co.*, 11 St. Rep. 335, 107 N. Y. 129, reversing 4 St. Rep. 772. Under the Code the court has no power to dissolve a corporation and appoint a receiver of its assets even upon petition of all the stockholders together with its creditors; the proper remedy is to proceed under the statute, and an order dissolving a corporation and appointing a receiver upon such application, when all parties and the attorney-general were represented in court and no objection was made, was vacated on motion of the attorney-general, on the ground that the court had no power

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to make such an order. *Matter of the Mart*, 5 N. Y. Supp. 82. It is said in this case that *Slee v. Bloom*, 19 Johnson, 456, is an undoubted authority for the position that a corporation may cease to have a corporate existence if it has no assets whatever, and ceases to do business, and there is a failure for a long time to elect directors, but that it is not an authority for an application such as was made in *Matter of Mart*, *supra*.

A corporation may be dissolved by the surrender of its charter, and its acceptance by the State, but it cannot be held to be actually dissolved until so adjudged and determined, either by judicial sentence or sovereign power; and a court of equity has not, by virtue of its general inherent powers, the right to dissolve a corporation; such power is entirely statutory and can only be exercised in a manner sanctioned by the legislature. *Magee v. Genesee Academy*, 17 St. Rep. 221, citing *Kincaid v. Dwinelle*, 58 N. Y. 543; *Denike v. N. Y. & Rosendale Lime Co.*, 80 N. Y. 599. It was held, in *Matter of Petition for the Dissolution of the Sportsmen's Association*, 17 St. Rep. 879, 15 Civ. Pro. 215, 2 Supp. 63, that the provisions of the Code as to the voluntary dissolution of a corporation applied only to corporations organized for the purposes of trade, business, and profit, not to those of a social character. In *Matter of American Dramatic Fund Association*, 1st District at Chambers, 22 Abb. N. C. 231, 3 Supp. 793, it was held that the Code provisions applied to all corporations, except to an incorporated library society, to a religious corporation, or to a select school or academy incorporated by the regents university, or by the legislature, or to a municipal or other political corporation, all of which are exempted from the provisions of § 2419 by § 2431; that the corporations whose object is the constitution and administration of a fund for the payment of annuities, and allowances to members and beneficiaries, and for the burial of those entitled to interment under its by-laws or regulations, are within the provisions of the Code, and further that the property of such corporation may be distributed according to a plan approved by the members of the association; and it is not an objection to dissolution, that owing to the nature of the corporation some of the details prescribed by statute, as to distribution by receiver, cannot be carried out.

Proceedings to dissolve a corporation, instituted by its board of directors, are not part of an action by the people to dissolve it

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because of a forfeiture of its charter, even though the proceedings instituted by the directors were regular up to the time of the presentation of the petition to the court, which was prior in point of time to the commencement of the action. *People v. Seneca Lake Grape & Wine Co.*, 52 Hun, 174, 23 St. Rep. 346, 5 Supp. 136.

The right and power conferred upon the officers of an insolvent corporation to prosecute a proceeding for the voluntary dissolution and distribution of his property, through the medium of receivers, among those entitled to receive it, is permissive merely, and cannot be construed as a surrender by the State of its right to enforce a forfeiture of the charter of the corporation, whenever it sees fit to do so. Where, in an action brought by the attorney-general to obtain a judgment dissolving a banking corporation, he alleged that it was insolvent, had suspended its ordinary business, and that the superintendent of banks had taken possession of its property, and the answer did not deny the insolvency, but alleged as a separate defence that, prior to the commencement of the action, proceedings had been taken for a voluntary dissolution of the corporation, it was held that the pendency of such proceedings was not a bar to the maintenance of the action by the attorney-general. *People v. Murray Hill Bank*, 10 App. Div. 328, 75 St. Rep. 1203, 41 Supp. 804. It was subsequently held in connection with the same proceedings that the proceeding for a voluntary dissolution abated by the entry of the judgment of dissolution of the corporation in an action brought by the attorney-general. *Matter of Murray Hill Bank*, 14 App. Div. 318. On appeal, 153 N. Y. 199, it was held, affirming the appellate division, that after the superintendent of banks has taken possession of the assets of the insolvent banking corporation, with the intention of having an action brought by the attorney-general to dissolve the same, the directors cannot anticipate such action on the part of the State by instituting a proceeding for voluntary dissolution, and that an action for involuntary dissolution by the attorney-general in the name of the people under the Banking Law, and under the law, begun after the special proceeding, takes the priority; and that the provisions of the Banking Law, being the special and later statute, are paramount and inconsistent with the Code. See *Matter of Murray Hill Bank*, 9 App. Div. 546, 41 N. Y. Supp. 914.

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There is no obligation to the State or to the public imposed upon a private manufacturing corporation to carry on a business for which it was formed; it may at any time put an end to its transactions and voluntarily wind up its affairs. *Skinner v. Smith*, 56 Hun, 437, 31 St. Rep. 448, 10 Supp. 81, affirmed, 134 N. Y. 240, 47 St. Rep. 528; holding that a manufacturing corporation may discontinue its operations when unprofitable, for the purpose of protecting its shareholders from further loss. See, however, *People v. Ballard*, 136 N. Y. 639, referred to in *Vanderpoel v. Gorman*, 140 N. Y. 563, 56 St. Rep. 503. The method of effecting corporate dissolution when prescribed by statute as in this State is exclusive, and must be substantially followed. *Hitch v. Hawley*, 132 N. Y. 212, citing *Verplanck v. Mercantile Insurance Co.*, 1 Edw. Ch. 84.

Proceedings for the voluntary dissolution of a corporation are special and statutory, and although instituted in a court of general jurisdiction, must conform to the statute. *Chamberlain v. Rochester, etc., Co.*, 7 Hun, 557; *Matter of Westchester Iron Co.*, 15 How. 7. The court has no power to appoint a temporary receiver, or to enjoin the bringing of suits against it prior to the entry of the order. The power can only be exercised on granting the final order. *Matter of French Mfg. Co.*, 12 Hun, 488; *Chamberlain v. Rochester, etc., Co.*, 7 id. 557; *Matter of E. M. Boyton & Co.*, 34 id. 369; *Matter of Waterbury*, 8 Paige, 380. And it seems not until the coming in of the report of the referees to whom claims are to be presented. *Matter of Edson, etc., Co.*, 1 Law Bull. 52. (These decisions were under a former statute.)

When the charter provided that the corporation might discontinue business when stockholders owning two-thirds of the capital stock should vote to do so, it was held such a vote was effectual, but that the corporate existence continued for the purpose of closing its affairs. *Green v. Seymour*, 3 Sandf. Ch. 285. A decree for dissolution in an action by a stockholder or creditor, who is also the president, and in a case not authorized by statute, cannot be sustained, although consented to by the president and by one or more of the trustees individually, for an application for a voluntary dissolution must proceed from the company or its board of trustees. *Blevin v. Penn Steel and Iron Co.*, 9 Abb. N. C. 205. But a judgment in an action brought by the attorney-general is not invalidated by the consent of the com-

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pany. *People v. Globe Ins. Co.*, 60 How. 52. It was held in *Matter of Niagara Ins. Co.*, 1 Paige, 258, that under the then existing statute the court would not decree a dissolution of the corporation simply upon request of a majority of the directors and stockholders. But see language of this section and § 2429. It was further held in that case that where the owners of a large proportion of the stock found it to their interest to withdraw their capital, it will be deemed presumptive evidence that the interest of the stockholders generally will be promoted by a dissolution of the corporation. The omission of a railroad company to elect officers, sale of its assets and failure to do business does not work a dissolution of a corporation; in order to do that there must be a surrender of its charter to, and acceptance by, the State, or judgment of dissolution. *Allen v. N. J. Southern R. R. Co.*, 49 How. 14. And a number of cases are cited to sustain the proposition. However, in *Webster v. Turner*, 12 Hun, 264, at General Term, it is said, all concurring, that when a corporation, with the consent and approval of all its stockholders, sold its entire property and effects with the intent and for the purpose of discontinuing the business of the corporation, and declared itself dissolved, did no business afterward, held no meetings and owed no debts, these acts were equivalent to a surrender of its corporate rights, citing numerous cases. And in *Erwin v. The Oregon Steam Navigation Co.*, 22 Hun, 598, it is held that the only effect of a resolution dissolving a corporation would be to deprive the corporation of the power of engaging in new business, and to leave it clothed with full power, so far as necessary, to close up all its affairs, pay all its debts, and distribute its property. It is held in *Denike v. N. Y. & R., etc., Co.*, 80 N. Y. 599, that all the stockholders uniting might undoubtedly surrender the franchises of the corporation and work its dissolution, but that a portion of them cannot do so in the absence of statutory authority.

The life of a corporation continues until the making of a final order dissolving it. So held where the directors of a corporation took proceedings for its voluntary dissolution. It was held that there was no personal liability on the part of the defendants. The proceedings were those of the corporation by its constituted agents. *Drew v. Keufer*, 81 Hun, 144, 62 St. Rep. 697, 30 Supp. 733. Same case reported under the title of *Drew v. Longwell*, 81

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Hun, 144, citing *Skinner v. Smith*, 56 Hun, 437, 31 St. Rep. 448; *Marbled Iron Works v. Smith*, 4 Duer, 662. An action by the attorney-general to dissolve a corporation takes precedence of a proceeding under the Code by the directors for a voluntary dissolution; so held where the proceeding was commenced prior to the action but subsequent to the time when the superintendent of banks took possession of the banking corporation sought to be dissolved. Both the action and the proceeding cannot be carried on together. *Matter of Murray Hill Bank*, 26 Civ. Pro. 323.

In *Re American Dramatic Fund Association*, 22 Abb. N. C. 231, 3 Supp. 793, the question was discussed under what circumstances a corporation will be dissolved. It is held that the fact that all of the details required by statute to be complied with in the distribution by the receiver cannot be carried out does not render the statute inapplicable where those requirements are not pertinent in view of the circumstances and character of the corporation. The attorney-general must be given notice of the application made under § 2419, pursuant to provisions of chapter 282 of Laws of 1896, amending chapter 378 of the Laws of 1883, whether the corporation is solvent or insolvent. The court may vacate an order to show cause why a corporation should not be dissolved if granted without such notice. The fact that the court has no power to make such an order does not prevent it subsequently vacating it. *Matter of Broadway Insurance Co.*, 23 App. Div. 282, 48 Supp. 299, 82 St. Rep. 299. A court of equity has no power to appoint a receiver to take charge of and continue the business of the solvent corporation in a proceeding which does not ask for the dissolution, but is intended to hinder and delay creditors who bring suit. *Matter of Atlas Iron Construction Co.*, 72 St. Rep. 801, 38 Supp. 173.

Where the directors of a manufacturing company, in proceedings for voluntary dissolution, applied for the appointment of temporary receivers and the schedule showed a surplus instead of a deficiency of assets, it was held that no case was made for the appointment of temporary receivers and the schedules were not allowed to be amended so as to decrease the amount of assets. *Matter of Hitchcock Manfg. Co.*, 1 App. Div. 164, 73 St. Rep. 46, 37 Supp. 834.

Art. 2. Petition, Schedule, and Affidavit.

ARTICLE II.

PETITION, SCHEDULE, AND AFFIDAVIT. §§ 2421, 2422.

§ 2421. Contents of petition.

The petitioner must show that the case is one of those specified in the last two sections, and must state the reasons, which induce the petitioner or petitioners to desire the dissolution of the corporation. A schedule must be annexed to the petition, containing the following matters, as far as the petitioner or petitioners know, or have the means of knowing the same:

1. A full and true account of all the creditors of the corporation, and of all unsatisfied engagements, entered into by, and subsisting against, the corporation.

2. A statement of the name and place of residence of each creditor, and of each person with whom such an engagement was made, and to whom it is to be performed, if known; or, if either is not known, a statement of that fact.

3. A statement of the sum owing to each creditor, or other person specified in the last subdivision, and the nature of each debt, demand, or other engagement.

4. A statement of the true cause and consideration of the indebtedness to each creditor.

5. A full, just, and true inventory of all the property of the corporation, and of all the books, vouchers, and securities, relating thereto.

6. A statement of each incumbrance upon the property of the corporation, by judgment, mortgage, pledge, or otherwise.

7. A full, just, and true account of the capital stock of the corporation, specifying the name of each stockholder; his residence, if it is known, or if it is not known, stating that fact; the number of shares belonging to him; the amount paid in upon his shares; and the amount still due thereupon.

§ 2422. Affidavit to be annexed.

An affidavit, made by each of the petitioners, to the effect that the matters of fact, stated in the petition and the schedule, are just and true, so far as the affiant knows or has the means of knowing the same, must be annexed to the petition and schedule.

Under the former statute it was held that the petition should contain a statement of the books, vouchers, and securities, relating to the corporation, of the incumbrances on its property, the nature of the debt or demand due the several creditors, and the true cause and consideration of such indebtedness; that the stock not issued to the stockholders named is still owned by or in the possession of the corporation, or that it has not been issued, and the property should be fully described. Such an inventory and a full statement of the books, vouchers, and securities relating to the property will be required for the benefit of the receiver. Where it appeared by the petition and proof that one-half of the shares of the corporate stock was owned by the petitioners, who were two of the trustees of the company proceeded against, and the other half was owned by individuals, appellants, and these

parties differed concerning the management of the company, but it was not clearly stated why the company should be dissolved, the petition was held defective. *Matter of Pyrolusite Manganese Co.*, 29 Hun, 429.

The petition for the dissolution of a corporation must fully conform to the statute in every particular. *Ex parte Dubois*, 15 How. 7, 6 Abb. Pr. 386. Under the statute requiring a full, just, and true inventory of all the property of, and the statement of all the books, vouchers, and securities relating to, the corporation to be annexed to a petition for the voluntary dissolution thereof, if an omission exists and does not show lack of good faith, nor afford evidence of a fraudulent purpose, an objection thereto does not go to the jurisdiction of the court and may be obviated by evidence. *Matter of Santa Eulalia Silver Mining Co.*, 21 St. Rep. 89, affirming 2 Supp. 221; see, also, provisions of § 2427, authorizing amendment to schedule.

Precedent for Petition—Short Form.

To the Supreme Court of the State of New York :

The petition of John B. James and John B. James, Jr., respectfully shows to this court :

That they are a majority of the directors, etc., of the James Cement Company, a corporation created by and under the laws of the State of New York, to wit, by and under chapter 40, Laws of 1848, for the purpose of organizing companies for mining and mechanical purposes.

That they have discovered that the stock, effects, and other property of said corporation are not sufficient to pay all just demands for which it was liable, or to afford a reasonable security to those who may deal with it; and that they deem it beneficial to the interest of the stockholders that the said corporation should be dissolved for the following reasons, to wit : (state them).

That the principal office of the said corporation is located in the town of Esopus, Ulster County, in this State.

That a schedule is annexed to this petition, marked "A," containing the following matters, as far as your petitioners know, or have the means of knowing the same (here insert the paragraphs numbered, respectively, from 1 to 7, both inclusive, of the above section).

Wherefore your petitioners pray for a final order of this court dissolving the said corporation, as prescribed in title 11 of chapter 17 of the Code of Civil Procedure, and for such other and further relief as may be proper.

Dated January 10, 1887.

JOHN B. JAMES,
JOHN B. JAMES, Jr.

ULSTER COUNTY, ss. :

John B. James and John B. James, Jr., being severally duly sworn,

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each for himself, says that the matters of fact stated in the foregoing petition subscribed by them, and the schedule thereto annexed, and therein referred to, marked "A," are just and true, so far as he knows, or has the means of knowing the same.

(*Jurat.*)

(Signatures.)

Petition.

SUPREME COURT—STATE OF NEW YORK, CITY AND COUNTY OF NEW YORK.

In the Matter of the Petition of a Majority of the Board of Directors of the Broadway Fire Insurance Company, of the city of New York, for a Voluntary Dissolution of said Company.

} 23 App. Div. 282.

The petition of ———, ———, respectfully shows unto this court :

That they are a majority of the directors of the Broadway Insurance Company of the city of New York, a corporation duly organized under the Laws of the State of New York for the purpose of insuring against loss or damage by fire ; that it is the judgment of the board of directors of the said Broadway Insurance Company, expressed by a resolution entered upon the minutes at the regular monthly meeting of said board, held at the office of said company, 63 William Street, in the city of New York, on the 11th day of November, 1896, that it is beneficial to the interest of the stockholders of said corporation that said corporation should be dissolved, and your petitioners respectfully show and represent that they and each of them deem it beneficial to the interests of the stockholders that the corporation should be dissolved for the following reasons :

The capital stock of said corporation is \$200,000 : the company was organized and commenced business in December, 1849, and by reason of the judicious management of the officers in control thereof for many years, accumulated a large surplus out of which a dividend of 50 per cent. was declared and paid to the then stockholders of record some years ago ; and such surplus has since dwindled down until, according to a report rendered to the Superintendent of Insurance Department of the State of New York the 31st of December, 1895, it was reduced to the sum of \$43,572.55, out of which the customary semi-annual dividends of five per cent. have been paid on the first day of February and the first day of August, amounting in the aggregate to the sum of \$20,000 ; so that the surplus of said corporation has been greatly reduced and the payment of dividends upon the stock in the immediate future becomes extremely problematical.

That the total receipts of the said corporation for the year 1895 from all sources amounted to \$267,437.09, while the aggregate disbursements during said year amounted to \$282,327.23, and the expenses of carrying on said corporation under existing circumstances is larger than the profits after the payments of losses would reasonably warrant and justify ; and dividends for some time have been

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declared and paid, not out of the profits actually made, but out of the surplus previously accumulated.

That from the experience derived by your petitioners from their many years of service in the said corporation they have arrived at the conclusion that companies with small capital and small surplus cannot successfully compete in view of the enormous expense ratio with companies having larger surplus and larger capital, which derive their revenues from the earnings of their securities, and are able to run along and pay dividends out of said earnings, even though no substantial profit be made upon the underwriters; that by winding up the corporation at the present time—a very advantageous contract of re-insurance having been made with the Hartford Fire Insurance Company, of Hartford, in the State of Connecticut, a company duly authorized to transact the business of fire insurance in the State of New York—the Broadway Insurance Company will rid itself of all outstanding liabilities, and by a prompt winding up of its affairs will be able to pay to the stockholders, in the judgment of your petitioners, as much as 150 per cent. upon the par value of their stock, a sum largely in excess of the market value of said stock, which has been sold in the open market of late as low as 108 per cent.

That said board of directors of the said Broadway Fire Insurance Company, at the meeting aforesaid, re-insured all its outstanding risks in said Hartford Fire Insurance Company, and sold its office furniture and maps, etc., to said Hartford Insurance Company for the sum of \$2,500, the sum at which the same had been carried as assets on the books of the said company; and said Hartford Fire Insurance Company also assumed the payment of the rent of the premises No. 63 William Street, in the said city of New York, in which the business of the Broadway Fire Insurance Company was carried on, and which is the principal office of the said corporation, so that said company has now no liabilities of any kind, nature, or description, except the claims of its stockholders, whose holdings are disclosed upon the schedule hereto annexed and marked "Exhibit A," and made a part hereof, which contains a full, just, and true account of the capital stock of the corporation, specifying the names of each stockholder, his residence if it is known, and if it is not known stating that fact, and the number of shares belonging to him, all of said capital stock being fully paid up stock, the whole amount of the capital stock of the said corporation, to wit, the sum of \$200,000, having been actually paid in in cash; and certain unadjusted losses more particularly specified, together with the name and place of residence of each person, firm, or corporation to whom said sums are due, when such place of residence is known, and when not known with a statement of that fact, upon the schedules hereto annexed, and marked "Exhibit B," and made a part hereof.

Annexed hereto, marked "Exhibit C," is a full, just, and true inventory of all the property of the corporation, and of all the books, vouchers, securities relating thereto.

There are no incumbrances upon any such property either by judgment, mortgage, pledge, or otherwise.

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Wherefore, your petitioners pray for a final order of this court dissolving said corporation as prescribed in Title II., chapter 17 of the Code of Civil Procedure, and for such other and further relief as may seem proper.

Dated, at the city of New York, this 11th day of November, 1896.
 (Verification.) (Signatures of petitioners.)

Petition. (134 N. Y. 212.)

In the Matter of the Application of the Trustees of a corporation called "Importers and Gro- cers' Exchange of New York," for a voluntary dissolution.	}	Petition.
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To the Supreme Court of the State of New York :

The petition of (here insert names of trustees desiring dissolution) respectfully shows :

1. That the said Importers and Grocers' Exchange of New York is a corporation created by and under the laws of the State of New York, having been incorporated under the provisions of the act entitled "An act to provide for the incorporation of exchanges, or boards of trade," passed May 3, 1877, and its principal office is located at No. 107 Water Street, in the city of New York, in the county of New York.

2. That your petitioners are a majority of the trustees having the management of the concerns of said corporation holding and owning most of the capital stock thereof. That the said (insert name of president) is president, and that the said (insert name of treasurer) is treasurer of the exchange. That the full board of trustees consists of fifteen members. That the names and residences of all such trustees who do not unite in this petition are as follows (insert names of such trustees, with their address).

3. That the nature of the business, and the objects for which said corporation was formed, are, to foster trade and commerce in groceries and East Indian and South American products, to protect said trade from unjust and unlawful exactions, to reform abuses in such trade, to diffuse correct and reliable information among its members, and to produce uniformity and certainty in the customs and charges in the trade in such merchandise; to settle differences between the members of said corporation arising out of the trade in said merchandise, and to promote a more enlarged and friendly intercourse between merchants engaged in the said trade, and generally to increase the facilities for conducting the trade in groceries and East Indian and South American products.

4. That said exchange has already outlived its usefulness; that as early in its existence as the year 1885, and after two years of business, a petition was presented to the trustees by the members of said exchange, asking them to wind up the corporation and procure its dissolution, for the reason that it was not of any real benefit to its members. That such petition was signed by 190 out of a total

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membership of 220. That at the time the trustees deemed it best to continue business for some time longer, in the hope that by amendment of the rules and regulations the exchange might still be made to serve the purposes of its creation; but it has been found that, aside from making an unreliable daily quotation in the price of tea, and giving the members the numbers of tons and the receipts and stock of tea and sugar, it furnished no information of any value. The daily circular was omitted for eighteen months, and has only recently been revived by a few personally interested.

That the exchange-room is not attended from day to day by more than two or three members. That a young man is kept in attendance, who, at the instance of a few men engaged in the tea trade, writes up a few figures on the blackboard, and sends out the daily circular to prices based thereon. This was also omitted for eighteen months, but has been revived, as before stated.

That the trust fund of the exchange has continued to increase from annual interest, but no new membership tickets are sold. That the price or value of the seats, or privileges, has receded from \$750 to \$200 each. That aside from a very few no interest is manifested by members in the affairs of the exchange. That the meeting, or exchange-room, has been removed from time to time to smaller quarters, until at present one small room at No. 107 Water Street, located on the third floor of the building, divided by a panel partition, is found to be more than ample accommodation for the few who go there, and the rental of said room is the sum of \$300 per annum.

That the members of said exchange number about 215, and the sale of membership tickets, or certificates, from time to time, has accumulated a trust fund, now amounting to upwards of \$60,000, in the distribution of which all stockholders and members are interested.

That the great majority of all the members are still desirous of having the corporation dissolved, and to further their choice your petitioners, being a majority of the trustees favoring such action, and believing it beneficial to the interests of the stockholders and members, therefore file this their petition accordingly, to procure a voluntary dissolution of said corporation, and a suitable distribution of its trust fund to those entitled thereto.

5 That the schedule hereto annexed states, so far as your petitioners know or have means of knowing:

(1) A full and true account of all creditors of the corporation, and of all unsatisfied engagements entered into by and subsisting against the corporation.

(2) A statement of the name and place of residence of all creditors, and of each person with whom such engagement was made and to whom it is to be performed, if known; or if either is not known a statement to that effect.

(3) A statement of the sum owing to each creditor or other person specified in the last subdivision, and the nature of the debt, demand, or other engagement.

(4) A statement of the true cause and consideration of the indebtedness to each creditor.

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(5) A full, just, and true inventory of all of the property of the corporation, of all the books, vouchers, and securities relating thereto.

(6) A statement of each incumbrance on the property of the corporation by mortgage, judgment, pledge, or otherwise.

(7) A full, just, and true account of the capital stock of the corporation, specifying the name of each stockholder, his residence, if it is known, or if it is not known stating that fact; the number of shares belonging to him; and the amount still due thereupon; also the names and residences of all the members if known; or if it is not known stating that fact.

6. There is no stock remaining unissued or unpaid.

7. That no other application has been made for an order herein applied for.

Wherefore, your petitioners pray for a final order dissolving said corporation and appointing a receiver of its property to wind up its affairs and distribute its assets to those entitled thereto, and for such other and further relief as may be just.

Dated New York, May 21, 1887.

(*Signatures and verification.*)

Schedule.

Subdivision 1.—A full and true account of all the creditors of the corporation, and of all unsatisfied engagements entered into by and subsisting against the corporation:

Joseph J. O'Donohue, No. 44 West 54th Street, New York City, from whom the corporation or exchange has a lease of the room or premises at No. 107 Water Street, occupied for the business of the exchange. The lease expires May 1, 1888, and there are no arrears of rent unpaid. The next payment falls due August 1, 1887.

A. B. Bisland, young man in charge as manager; hired by the month at a salary of \$15 per week. He is paid to date.

Subdivision 2.—A statement of the names and place of residence of each creditor, and of each person with whom such an engagement was made and to whom it is to be performed:

Joseph J. O'Donohue, No. 44 West 54th Street, New York City.

Albert B. Bisland, residing at 1280 Fulton Street, New York City.

Subdivision 3.—A statement of the sum owing to each creditor or other person specified in the last subdivision, and the nature of each debt, demand, or other engagement.

Subdivision 4.—A statement of the true cause and consideration of the indebtedness of each creditor.

Subdivision 5.—A full, just, and true inventory of all the property of the corporation, and of all the books, vouchers, and securities relating thereto.

Subdivision 6.—A statement of each incumbrance upon the property of the corporation by judgment, mortgage, pledge, or otherwise.

Subdivision 7.—A full, just, and true account of the capital stock of the corporation, specifying the name of each stockholder, his resi-

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dence, if it is known, or if it is not stating that fact; the number of shares belonging to him and the amount paid in upon his shares, and the amount still due thereupon. Also the names and residence of all the members, if known, or if not known, stating that fact:—

The capital stock is \$———(insert amount divided into——— shares of \$———each.

The memberships are——— in number.

Total paid thereon is——— as follows, viz:—

(Insert number) at \$——— each.

(Insert number) at \$——— each.

(Then insert list of stockholders with their residences, number of shares, amount paid, amount due on shares.)

(Then follows a list of the members with their residence and business address of each.)

(*Annex verification by petitioners.*)

Petition When Directors Equally Divided as to Management.

SUPREME COURT—CITY AND COUNTY OF NEW YORK.

In the Matter of the Application of One of
the Two Trustees of the Peekamose Fishing
Club, a Corporation Created and Existing
under the Laws of the State of New York, for
its Dissolution.

151 N. Y. 511.

To the Supreme Court of the State of New York:

The petition of J. Q. A. Ward respectfully shows:

1. That your petitioner is one of the two existing trustees of the Peekamose Fishing Club. That said club is a corporation created and existing by and under the Laws of the State of New York, more particularly under chapter 267 of the Laws of 1875, known as "An act for the incorporation of societies or clubs for certain lawful purposes," and the acts supplemental thereto and amendatory thereof.

That the principal office of said club is, as the terms of its articles of incorporation provide, located in the city of New York.

2. That said club was organized in or about the year 1880; by the terms of its constitution and by-laws its affairs were to be governed by five trustees. By reason of the death and non-compliance with the terms and provisions of the said constitution and by-laws of said club the number of trustees has been reduced to two, of which your petitioner is one. The said club has no stock. The said two trustees are the only two members thereof, and they are equally divided respecting the management of its affairs.

3. That your petitioner has discovered that the stock, effects, and other property, both real and personal, of said club are not sufficient to pay all just demands for which it is liable, or to afford a reasonable security to those who deal with it. It is deemed beneficial to the interests of the members of said club that the same should be dissolved for the following reasons:

The club was organized for the purpose of providing a suitable

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fishing preserve for the use of its members. With that purpose in view, it acquired certain lands adjacent to fishing streams in Ulster County, in the State of New York. These lands and a cabin erected thereon are a part of the assets of the club. As is hereinbefore alleged, the membership of said club, which was originally five, has been reduced to two, with no proportionate reduction in the club expenses. The remaining member of said club, other than your petitioner, is financially irresponsible, and your petitioner is unwilling to continue to advance or remain liable for the sums necessary to the protection of the club preserve for the purpose for which it was organized.

Annexed hereto is a schedule containing, so far as your petitioner knows, or has means of knowing :

I. A full and true account of all creditors of the corporation, and of all unsatisfied engagements entered into by and subsisting against the corporation.

II. A statement of the names and places of residence of each creditor and of each person with whom said engagement was made, and to whom it is to be performed, if known ; or, if either of them is not known, a statement to that effect.

III. A statement of the sum owing to each creditor or other person specified in the last subdivision, and the nature of each debt, demand, or other engagement.

IV. A statement of the true cause or consideration of the indebtedness of each creditor.

V. A full, just, and true inventory of the property of the corporation, and of all bonds, vouchers, or securities relating thereto.

VI. A statement of each incumbrance upon the property of the corporation by judgment, mortgage, pledge, or otherwise.

VII. A full, just, and true account of the capital stock of the corporation, specifying, in the name of each stockholder, his residence, if it is known ; or, if it is not known, stating that fact ; the number of shares belonging to him, the amount paid in upon his shares, and the amount still due thereupon.

Wherefore, your petitioner prays that a final order may be made herein dissolving the said corporation and appointing a receiver of its property.

J. Q. A. WARD.

(Add verification hereto.)

Schedule.

First. A full and true account of all the creditors of the corporation, and of all unsatisfied engagements entered into by and subsisting against the corporation, is as follows : (Insert names of creditors, objects for which amounts were advanced, and the amount so advanced.)

Second. A statement of the names and place of residence of each creditor and of each person with whom such an engagement was made, and to whom it is to be performed, if known, are set forth in paragraph marked "*First*" above.

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Third. A statement of the sum owing to each creditor or other person specified in the last subdivision, and the nature of each debt, demand, or other engagement, are set forth in paragraph marked "*First*" above.

Fourth. A statement of the true cause and consideration of the indebtedness to each creditor is set forth in paragraph marked "*First*" above.

A full and just inventory of all the property of the corporation, and of all books, vouchers, and securities relating thereto, is as follows :

The club property is situate in the town of Denning, Ulster County, State of New York, known as part of the "Lake or Gulf Lot," being eighty acres more or less, and lying on either side of the Rondout Creek, and described in a deed thereof from Nathan W. Watson and David B. Smith, recorded in Ulster County, the deed recorded Book No. 233, page 86. (Reference to said deed is hereby made.)

A small house situated thereon called "The Cabin," furniture, bedding, etc., contained in said house. Fishing privileges on certain portions of Rondout Creek. The books of said corporation have not been kept, and this deponent is unable to state what or where they are.

Fifth. A statement of each incumbrance upon the property of the corporation by judgment, mortgage, pledge, or otherwise. (There are none.)

Sixth. A full, just, and true account of the capital stock of the corporation, specifying the names of each stockholder, his residence, if it is known, or, if it be not known, stating that fact; the number of shares belonging to him, the amount paid in upon his shares, and the amount remaining still unpaid thereon.

The corporation or club has no stock. There are but two members, J. Q. A. Ward, 119 West 52d Street, New York City, the petitioner herein, and A. W. Dimock, Elizabeth, N. J.

J. Q. A. WARD.

(Add verification hereto.)

ARTICLE III.

PRESENTATION OF PETITION AND ORDER THEREON. TEMPORARY RECEIVER AND INJUNCTION. §§ 2423, 2424, 2425.

SUB. 1. ORDER TO SHOW CAUSE.

§ 2423. [Am'd, 1895.] Presentation of petition, etc. Order.

The papers must be presented at a special term of the Supreme Court, held within the judicial district, embracing the county wherein the principal office of the corporation is located. In a case specified in § 2420 of this act, the court may, in its discretion, entertain or dismiss the application. Where it entertains the application, or where the cause is one of those specified in § 2419 of this act, the court must make an order, requiring all persons interested in the corporation to show cause before it, or before a referee designated in the order, at a time and place therein specified, not less than three months after the granting of the order, why the corporation should not be

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dissolved. The order must be entered, and the papers must be filed, within ten days after the order is made, with the clerk of the county where the principal office of the corporation is located. If it shall be made to appear to the satisfaction of the court that the corporation is insolvent, the court may at any stage of the proceeding before the final order, on motion of the petitioners on notice to the attorney-general, or on motion of the attorney-general on notice to the corporation, appoint a temporary receiver of the property of the corporation, which receiver shall have all the powers and be subject to all the duties that are defined as belonging to temporary receivers appointed in an action, in section one thousand seven hundred and eighty-eight of this act. The court may also, in its discretion, at any stage in the proceedings after such appointment upon like motion and notice, confer upon such temporary receiver the powers and authority, and subject him to the duties and liabilities of a permanent receiver, or as much thereof as it thinks proper, except that he shall not make any final distribution among the creditors and stockholders, before final order in the proceedings, unless he is specially directed so to do by the court. If such receiver be appointed, the court may, in its discretion, on like motion and notice, with or without security, at any stage of the proceeding before the final order, grant an injunction, restraining the creditors of the corporation, from beginning any action against the said corporation for the recovery of a sum of money, or from taking any further proceedings in such an action theretofore commenced. Such injunction shall have the same effect and be subject to the same provisions of law as if each creditor upon whom it is served was named therein.

R. S. § 61, am'd; L. 1876; L. 1895, ch. 946.

§ 2424. Order to be published.

A copy of the order must be published, as prescribed therein, at least once in each of the three weeks immediately preceding the time fixed therein for showing cause, in the newspaper printed at Albany, in which legal notices are required to be published; and also in one or more newspapers, specified in the order, published in the city or county wherein the order is entered.

Id. § 62.

§ 2425. Id.; to be served on creditors and stockholders.

A copy of the order must also be served upon each of the persons specified in the schedule as a creditor or stockholder of the corporation, or as a person to whom an engagement of the corporation is to be performed, other than a person whose residence is stated to be unknown, or to be without the United States. The service must be made, either personally, at least twenty days before the time appointed for the hearing; or by depositing a copy of the order, at least forty days before the time so appointed, in the postoffice, inclosed in a postpaid wrapper, addressed to the person to be served, at his residence, as stated in the schedule.

Upon an application for a voluntary dissolution of a corporation, under the provisions of the Code, the court acquires jurisdiction upon a petition properly presented, and by the appointment of a receiver the property of a corporation comes into its possession, and it has power to preserve and protect it. For this purpose it may prohibit any interference therewith in any action thereafter instituted. Even if the order granted upon the petition is in some respects irregular, imperfect, and informal, it is

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not, because of this, a nullity. While a receiver so appointed may not interfere with the property until he has filed his bond, when this is done his title relates back to the date of his appointment. Even as to property of which the corporation had wrongfully obtained possession before the appointment of a receiver, after it has passed into his possession the owner may not, without first obtaining leave of the court, replevy it in an action against the receiver. An application under said provision, prayed for a dissolution of the corporation, the order granted thereon was entitled "In the Matter of the Application of the Directors" of the corporation for a voluntary dissolution. The order recited that the corporation was insolvent, and required all persons interested to show cause why the prayer of the petitioner should not be granted. *Held*, that this was substantially a requirement to show cause "why the corporation should not be dissolved," and so was sufficient in this particular. *Matter of the Christian Jensen Co.*, 128 N. Y. 550, 40 St. Rep. 621, 27 Abb. N. C. 303, affirming 59 Super. Ct. 552, 39 St. Rep. 379, 15 Supp. 144.

Where a perusal of the order would not inform either the creditors or stockholders that the dissolution of the corporation was demanded or contemplated by the proceedings, the order was void, and the court did not acquire complete jurisdiction over the proceedings sought to be instituted by the board of directors. *People v. Seneca Lake Grape & Wine Co.*, 52 Hun, 174, 23 St. Rep. 346, 5 Supp. 136, 17 Civ. Pro. 130, following *Matter of Pyrolusite Mfg Co.*, 3 Civ. Pro. 270, 29 Hun, 429.

The order to show cause is process for the purpose of bringing interested persons before the court, and there must be a strict compliance with the statutory provisions. Where the only requirement of the order was that persons interested "show cause why the prayer of the petition should not be granted," it was held to be neither in substance or effect what the law required. That as the Code required every person interested to be apprised of the fact that the proceeding was to dissolve the corporation and the order failed to give such information, the proceeding was void for lack of jurisdiction, and that the objection might be taken by any party to the proceeding at any stage thereof. *Matter of Pyrolusite Manganese Co.*, 29 Hun, 429.

Where an order did not direct publication and did not specify

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the newspapers in which publication was to be made, as required, it was said, that while it was a defect, it was not one which rendered the appointment of the receiver a nullity; also, that the court having jurisdiction of the proceedings had authority to make an order *nunc pro tunc* correcting the defect. *Matter of the Christian Jensen Co.*, 128 N. Y. 550, 40 St. Rep. 621, 27 Abb. N. C. 303, affirming 59 Super. Ct. 552, 39 St. Rep. 379, 15 Supp. 144. It is said, in *Matter of Westchester Iron Co.*, 15 How. 7, n., that the order should be published in the county where the principal office is situated.

The requirement of § 8, chapter 378, of Laws 1883, that a copy of all motions and of motion papers, and a copy of any other application to the court, together with a copy of the order or judgment to be proposed thereon, shall, in every action for the dissolution of a corporation, be served on the attorney-general, applies to proceedings for the voluntary dissolution of corporations, and the purpose of the statute is to require notice to be given to the attorney-general of the time and place when the petition will be presented to the court, so that he may present and be heard upon an initiatory application, as well as all the other proceedings to be had in the matter, and unless such notice is served or waived, the court has no jurisdiction to entertain the proceedings and the order is void. *People v. Seneca Lake Grape & Wine Co.*, 52 Hun, 174, 23 St. Rep. 346, 17 Civ. Pro. 130. It seems that the requirements of the statute with reference to service of notice upon the attorney-general in proceedings for the dissolution of a corporation may be satisfied by the acceptance of short notice. *Matter of Peckamose Fishing Club*, 151 N. Y. 511, dismissing appeals, 5 App. Div. 283, 284, 8 App. Div. 617. The appointment of a temporary receiver who shall have all the powers and duties of a permanent receiver in case the court so directs, except as to final distribution, is provided for by § 2423, while § 2429 provides for the appointment by final order of a permanent receiver, but does not define or fix his duties. The temporary receiver has the powers belonging to temporary receivers under § 1788 of the Code, which provides for the appointment of receivers in actions to procure the dissolution of corporations and to enforce the individual liability of the officers or members of corporations. The powers and duties of receivers are considered under § 2429. By chap. 245 of the

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Laws of 1880, § 42, of title 4, of chapter 8, part 3, of the R. S., is made applicable to a permanent receiver appointed under § 1788. Sections 66 and 89 of the same title are made applicable to receivers appointed under § 2429. It will thus be noticed that the confusion with reference to the rights, powers, and duties of receivers is almost inextricable, in that a portion of the Revised Statutes are applicable to receivers under voluntary dissolution, and also other portions of the Code. The matter is very fully treated of and the provisions of the Code and of the Revised Statutes given in full in Fiero on Special Actions, under receivers of corporations, at pages 1091, etc., and it is not therefore deemed desirable to reprint these provisions, as reference may be made to the Special Actions. By reason of this confusion, much difficulty arises as to the citation of authorities with reference to the rights, powers, and duties of receivers, as it is exceedingly difficult to determine to what extent decisions made with regard to the powers of receivers appointed under other statutes are applicable to receivers under voluntary dissolution. It may, of course, be presumed that the decisions made under statutes above referred to, are applicable to this class of cases, but each case must be carefully examined in order to determine its relation to the general rule relative to receivers. A number of the authorities on the subject of receivers are collated in the Special Actions, and other authorities are to be found under the subdivisions following, but it is difficult, if not impossible, to so classify these authorities that they may be said to be applicable in every instance to the specific provisions of the Code under consideration. The matter must be submitted to the careful examination of the practitioner in each individual case; and the author can only reiterate that the present confusion of the law with regard to receivers is a disgrace to the State of New York, affording endless annoyance and trouble to bench and bar, and a source of enormous and unnecessary expenses to litigants. The appointment of receivers of corporations, and the rules regulating their actions under the provisions of the Code in actions brought for the dissolution of corporations, will be found in Fiero on Special Actions, page 1187; actions for dissolution of corporation, at page 1036.

A receiver of a corporation becomes vested with the title to its property upon his appointment, and the court may enjoin

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creditors in actions begun against the property, even though the actions have been brought in a court of admiralty. *Matter of Schnyler Steam Tug Boat Co.*, 64 Hun. 384, 43 St. Rep. 163, 18 Supp. 891, affirmed, 136 N. Y. 169. The commissions of a temporary receiver on the voluntary dissolution of a corporation are governed by § 3320 of the Code of Civil Procedure, and not by § 76, chapter 8, part 3, of the Revised Statutes, which applies only to permanent receivers. Such commissions are not to be computed only upon the cash which actually comes into the hands of such temporary receiver, but he may be entitled in an extreme case to $2\frac{1}{2}$ per cent. of the value of the property coming into his hands for receiving and protecting the same; said sum to be determined and allowed by the court. It seems that such receiver is vested with the title of the corporate property so far as the purposes of his trust require. *Matter of Smith Co.*, 31 App. Div. 39, 52 Supp. 877.

In a proceeding for the voluntary dissolution of a corporation, the court may, at the time of appointing the temporary receiver, grant an injunction against the prosecution of suits against the corporation. It is not necessary that the motion for such injunction should be made after the appointment of the receiver. *Matter of Simons Co.*, 41 St. Rep. 355, 16 Supp. 13, distinguishing *In re French Manufacturing Co.*, 12 Hun. 488, decided under the Revised Statutes. The court has no power in a proceeding for the voluntary dissolution of a corporation to restrain creditors of the corporation from disposing of its bonds held as collateral to loans under lawful contracts empowering them to sell. The proceeding is purely statutory, and the restraining power of the court is such as given by the Code. The equity power of the court does not extend to the sequestration of the property of the corporation by means of the receiver. *Matter of Binghamton General Electric Co.*, 143 N. Y. 261, 62 St. Rep. 154.

Where a corporation was not insolvent at the time of the application, no injunction against creditors should have been granted. *Matter of Hitchcock Manfg. Co.*, 1 App. Div. 164. Where a temporary receiver has been appointed in proceedings for voluntary dissolution, the court cannot restrain a suit to foreclose a mortgage given by the corporation to a trust company to secure its bonds. Such an action is not one for the "recovery of a sum of money" within the meaning of the Code. An action

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for foreclosure is an action in equity, and the fact that, as an incident thereto, the court has jurisdiction, when such relief is asked, to award a judgment for the deficiency, does not alter the character of the action or bring it within § 2423. *Matter of Hamilton Park Co.*, 1 App. Div. 375, 72 St. Rep. 581, 37 Supp. 310.

Order to Show Cause Before the Court, Appointing a Temporary Receiver, etc.

At a Special Term of the Supreme Court, held in and for the Sixth Judicial District, at the court-house in the village of Delhi, Delaware County, N. Y., on the 28th day of January, 1896:

Present:—Hon. Garret A. Forbes, *Justice Presiding*.

In the Matter of the Application of the Directors
of the Norwich Cabinet Company for a Volun-
tary Dissolution.

On reading and filing the petition of Jeremiah W. Stokes, Adolphus Newton, and Richard J. Keppel, a majority of the directors of the Norwich Cabinet Company above named, verified January 25, 1896, and the schedules attached to said petition and a part thereof, from which it appears that the Norwich Cabinet Company is a domestic manufacturing corporation located at Norwich, Chenango County, N. Y., and that the said petitioners are a majority of the directors of said corporation and have the management of its concerns, that the stock effect and other property of said corporation are not sufficient to afford a reasonable security to those who may deal with it, and that it will be beneficial to the interests of the stockholders of said corporation, that the same be dissolved, and which petition and schedule contain all the matters specified in § 2421 of the Code of Civil Procedure.

And on further reading and filing the notice of this application of motion and of the order proposed to be obtained herein and the admission of the attorney-general of the State of New York of due and timely service of said notice, and of all the papers therein mentioned upon him; and on motion of Talbott & Collins, attorneys for said petitioners, it is

Ordered, that all persons interested in said corporation show cause before this court, at a Special Term thereof, appointed to be held in and for the sixth judicial district at the court-house in Morrisville, Madison County, N. Y., on the 5th day of May, 1896, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the said corporation should not be dissolved.

Ordered, further, that a copy of this order be published at least once in each week for three weeks immediately preceding the said 5th day of May, 1896, in the Albany Evening Journal, the newspaper printed at Albany, N. Y., in which legal notices are required to be published, and also in the Morning Sun, a newspaper published in

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Norwich, Chenango County, N. Y., the county in which this order is entered.

And it also appearing to the satisfaction of this court that the Norwich Cabinet Company is unable to pay and meet its obligations as they fall due, and is insolvent, it is further, on motion of Talbott & Collins, attorneys for said petitioners,

Ordered, that William H. Wells of Norwich, N. Y., be and he hereby is appointed temporary receiver of all the property, real and personal, things in action, effects, and assets, belonging to or held by said corporation, or in its possession, with the usual powers and duties that are defined as belonging to temporary receivers appointed in an action in § 1788 of the Code of Civil Procedure.

Ordered, further, that before entering upon the duties of his trust, said receiver execute and file with the clerk of Chenango County, a bond with two sufficient sureties to the people of the State of New York in the penal sum of \$26,000 (twenty-six thousand dollars), conditioned for the faithful discharge by said receiver of the duties of his trust, said bond to be approved as to its sufficiency and manner of execution by a justice of the Supreme Court; and upon the filing of the said bond thus approved, said receiver is authorized to take possession of and sequester all the property, real and personal, things in action, effects, and assets belonging to or held by said corporation or in its possession.

Ordered, further, that the said receiver so appointed, upon filing such bond, have all the powers and authority, and is subject to all the duties and liabilities of a permanent receiver as provided by the laws and practice of this State, except that he shall not make any distribution of the property in his hands among the creditors and stockholders of said corporation before the final order in these proceedings, unless he is especially directed so to do by the court.

Ordered, further, that such further application may be made to this court, under the provisions of this order, as the receiver may be advised is proper or necessary for his instruction or direction in the management and conduct of his trust.

Ordered, further, that all money of said corporation which may come into the hands of said receiver be immediately deposited by him in the Chenango National Bank of Norwich, N. Y., to his credit as such receiver, to be held by said bank subject to the further order of this court.

It is further ordered, that all persons, and especially creditors of said corporation, be and each and every one of them is hereby enjoined and restrained from bringing any action against said corporation for the recovery of a sum of money and from taking any further proceedings whatsoever in any such action heretofore commenced.

Granted. Enter in Chenango County

GARRET A. FORBES,

Justice Supreme Court.

TALBOTT & COLLINS,

Attorneys for Receiver, Syracuse, N. Y.

Art. 3. Presentation of Petition and Order Thereon.

Order to Show Cause Before Referee, Appointing Receiver, etc.

At a Special Term of the Supreme Court, held at the court-house in the city of Syracuse, on the 11th day of April, 1896:

Present :—Hon. F. H. Hiscock, *Justice Supreme Court*:

In the Matter of the Voluntary Dissolution of
the Alexandria Bay Electric Light and Power
Company, a Corporation.

On reading and filing the petition of William T. Bascom, James M. Ellis, Joseph Northup, and Charles H. Potter, duly verified on the 7th day of April, 1896, whereby it appears that said petitioners constitute a majority of the directors of the Alexandria Bay Electric Light and Power Company; that said company is a corporation created under the laws of the State of New York, doing business at Alexandria Bay, Jefferson County, N. Y.; that said company is insolvent and its property is not sufficient to pay all just debts for which it is liable, or to afford reasonable security to those who deal with it; that said company owns a quantity of real and personal property subject to incumbrance, and is indebted to divers persons in large amounts, a great part of which is past due; that said company is being pressed for payment but has no available funds with which to pay its debts or carry on its business, and is also unable to procure funds therefor. That actions are about to be commenced against said company by its creditors for the collection of debts against said company. That the interest is long past due upon the obligations of the company, and the incumbrances against its property, and the said company has no money to pay the same, and is unable to procure funds for that purpose; that if the property of the company is levied upon and sold under execution said property will be exhausted in paying costs and expenses, and there will not be enough to satisfy the claims of all the creditors; and that it will be beneficial to the interests of the stockholders and creditors that said corporation should be dissolved and its property placed in the custody of the court; and the said petition further containing schedules showing assets and liabilities of said corporation and the other matters required by statute to be shown, and also stating reasons why an injunction should be granted restraining creditors from suing said corporation, and it further appearing that said company is engaged in the business of furnishing lights by means of electricity to various people and corporations in Alexandria Bay, and that there is no other company or person engaged in that business; that it has a large number of contracts for that purpose, which it is now engaged in fulfilling, which are valuable and the only income the company has is from the same; that the plant of the company is valuable only for the purpose of supplying lights and power by means of electricity, and that unless the receiver is permitted to continue the business of the company the property and plant will greatly depreciate in value, and the stockholders and creditors will suffer great injury; now on motion of E. C. Emerson, of counsel for said petitioners, and on

Art. 3. Presentation of Petition and Order Thereon.

reading and filing due proof of service of notice of this application upon the attorney-general of the State of New York :

It is ordered, that all persons or corporations interested in said Alexandria Bay Electric Light and Power Company show cause before George S. Hooker, who is hereby appointed a referee for that purpose, at his office in the city of Watertown, N. Y., on the 15th day of July, 1896, at 10 o'clock in the forenoon of that day, why said corporation should not be dissolved pursuant to the rule and practice of the court.

It is further ordered, that a copy of this order be published in The Albany Evening Journal, the newspaper printed at Albany in which legal notices are required to be published, and in The Watertown Daily Times, a daily newspaper published in the city of Watertown, N. Y., once a week in each of the three weeks immediately preceding the said 15th day of July, 1896.

It is further ordered, that all creditors of said corporation be and they are hereby enjoined and restrained from commencing any suit against said corporation, and from further prosecuting suits already commenced.

It is further ordered, that Arthur E. Hume, residing in the village of Alexandria Bay, Jefferson County, N. Y., be and is hereby appointed temporary receiver of said corporation pursuant to § 2423 of the Code of Civil Procedure, and that such temporary receiver immediately take possession of all the property and effects, real and personal, of every name and nature, of said corporation and hold and administer the same according to law ; that before the said receiver takes possession of such property or enters upon the performance of his duties, he execute and file with the clerk of Jefferson County a bond to the people, in the penalty of \$5,000, conditioned for the faithful discharge of his duties as such receiver, said bond to be approved by a justice of this court.

It is further ordered that Jefferson County National Bank be and the same is hereby designated as a place of deposit wherein all the funds of said corporation not needed for immediate disbursements shall be deposited.

It is further ordered, that such temporary receiver, in the performance of the duties of his trust, act in all things subject to the order of this court.

It is further ordered, that said temporary receiver have permission, and he is hereby authorized to continue and carry on the business of said company in the generation and furnishing of electricity for the purpose of lights and power until the further order of the court; provided, however, that no indebtedness shall be incurred by said temporary receiver for that purpose, except for necessary help and fuel, without the further order and express authority of this court.

Let this order be entered and the papers filed in Jefferson County.

F. H. HISCOCK,

Justice Sup. Ct.

Art. 3. Presentation of Petition and Order Thereon.

Order to Show Cause.

(Caption.)

SUPREME COURT.

In the Matter of the Application of one of
the two trustees of "The Peekamose Fish-
ing Club," a corporation created and existing
under the laws of the State of New York, for
its dissolution. } 151 N. Y. 511.

On reading and filing the petition of J. Q. A. Ward, one of the two trustees of the Peekamose Fishing Club, a domestic corporation, created under the laws of this State, and having its principal office located in the city and county of New York, and the schedules thereto annexed, duly verified by the petitioner herein on the 16th day of May, 1894, and on motion of John M. Perry, attorney for the petitioner, it is

Ordered, that all persons interested in such corporation show cause at a Special Term of this court to be held at the chambers thereof at the county court-house in, the city of New York, on the 24th day of August, 1894, at 11 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why the said corporation should not be dissolved; and it is further

Ordered, that a copy this order be published at least once in each of the three weeks immediately preceding the said 24th day of August, 1894, in the Daily Law Journal and New York Evening Post, newspapers published at the city of New York, county of New York, where this order is entered.

Enter.

EDWARD PATTERSON,
Justice Supreme Court.

Order of Reference.

At a Special Term of the Supreme Court of the State of New York held at the county court-house in the city of New York on the 30th day of August, 1894:

Present:—Hon. Miles Beach, *Justice.*

In the Matter of the Application of one of the
two trustees of the Peekamose Fishing Club
for its voluntary dissolution. } 151 N. Y. 511.

The petitioner having, upon his duly verified petition and schedules, procured on the 21st day of May, 1894, an order directing all parties interested in the Peekamose Fishing Club to show cause at a Special Term of this court, on the 24th day of August, 1894, why said corporation should not be dissolved, and said motion having duly come on to be heard,

Now, on reading said order to show cause, and the petition and schedules upon which the same was granted, all of which were duly

 Art. 3. Presentation of Petition and Order Thereon.

filed herein within ten days from the time of granting of said order ; and on reading the admission of service of the notice of this motion upon him by the attorney-general, and the affidavit of John M. Perry showing the due service by mail of a copy of said order to show cause upon all persons named in said schedule as creditors or stockholders, at the places stated therein as their respective residences ; and the admission of due service of a copy of said order on B. C. Chetwood, Esq., attorney for A. W. Dimock, and the affidavits of David S. Ourn and Joseph S. Seymour, showing the due publication of said order in the New York Law Journal and the Evening Post, at least once a week in each of the three weeks immediately preceding the return day of said order to show cause, all of which have been duly filed herein, and after hearing John M. Perry in behalf of the petitioner in support of this order, and on reading and filing the answer of A. W. Dimock, and after hearing George H. Hart, Esq., of counsel for said Dimock, opposed,

Ordered, that Augustus C. Brown, Esq., counsellor-at-law, be and he is hereby appointed referee herein to hear the allegations and proofs of the parties and determine the facts, and report the same in writing with all convenient speed to this court.

MILES BEACH,
J. S. C.

Order to Show Cause.

(Caption.)

SUPREME COURT.

In the Matter of the Application of the Corporation called "Importers and Grocers' Exchange of New York," for voluntary dissolution.	}	132 N. Y. 212.
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On reading and filing the petition of (here insert names of petitioners) as trustees of the Importers & Grocers' Exchange of New York, and the schedule thereto annexed, duly verified by the petitioners on the 2d and 4th days of May, 1887, and on motion of Thomas G. Evans, attorney for petitioners, it is

Ordered, that all persons interested in said corporation show cause before this court at a Special Term thereof to be held at the chambers of said court in the county court-house in the city of New York, on the 10th day of August, 1887, at the opening of the court on that day or as soon thereafter as counsel can be heard, why the said corporation should not be dissolved, and why such petitioners should not have such other and further relief as to the court may seem fit.

It is further ordered, that a copy of the order be published as prescribed herein at least once in each of the three weeks immediately preceding the time fixed herein for showing cause in the New York Sun and in the New York Times, two newspapers published in the city and county of New York.

RICHARD L. LAWRENCE,
J. S. C.

Art. 4. Hearing and Proceedings Thereon.

ARTICLE IV.

HEARING AND PROCEEDINGS THEREON. §§ 2426, 2427, 2428.

§ 2426. Hearing.

At the time and place specified in the order, or at the time and place to which the hearing is adjourned, the court, or the referee, must hear the allegations and proofs of the parties, and determine the facts. If a referee was not designated in the order to show cause, the court may, in its discretion, appoint a referee when or after the order is returnable. The decision of the court, or the report of the referee, must be in writing, and must be made and filed with all convenient speed. It must contain a statement of the effects, credits, and other property, and of the debts and other engagements, of the corporation, and of all other matters, pertaining to its affairs.

§ 2427. [Am'd, 1894.] *Id.*; original papers may be used.

The court or the referee is entitled to use, upon the hearing, the original petition and the schedules annexed thereto; and the clerk must transmit them accordingly, upon the written order of the judge, or of the referee. In that case, they must be returned with the decision or report. The court may, at any stage of the proceedings before final order, on the application of the petitioners, or a majority of them, or on the application of the temporary receiver, grant an order amending the schedules annexed to the original petition, by the insertion of additional items, or by making the statements or inventory fuller and in greater detail than as originally filed, with the like effect as though said petition and schedules had been originally presented and filed as amended.

L. 1894, ch. 258.

§ 2428. Application for final order.

Where the hearing is before a referee, a motion for a final order must be made to the court, upon notice to each person who has made himself a party to the proceedings, by filing with the clerk, before the close of the hearing, a notice of his appearance, in person or by attorney, specifying a postoffice within the State, where such a notice may be served. The notice may be served as prescribed in this act, for the service of a paper upon an attorney in an action. Where the hearing was before the court, a motion for a final order may be made immediately, or at such a time and upon such a notice, as the court prescribes.

Answer.

SUPREME COURT—CITY AND COUNTY OF NEW YORK.

In the Matter of the Application of one of the two trustees of the Peekamose Fishing Club, a corporation created existing under the laws of the State of New York, for its dissolution.

151 N. Y. 511.

Edward N. Whiton, appearing herein by J. Alexander Koonos, his attorney, and answering the petition herein entitled incorrectly as above, states :

1. Admits that the Peekamose Fishing Club is a corporation created and existing by and under the laws of the State of New York, and

Art. 4. Hearing and Proceedings Thereon.

more particularly under chapter 267 of the Laws of 1875, known as "An act for the incorporation of societies or clubs for certain lawful purposes," and the acts supplemental thereto and amendatory thereof; that the principal office of said club is, as the terms of its articles of incorporation provide, located at the city of New York; that said club was organized on or about the 16th day of December, 1879; that said club has no stock; that the management of the affairs of the club was and is vested in a board of five trustees.

2. Alleges that the purposes and business for which the said club was organized, as stated in its constitution, was "The protection, increase and capture of brook trout and the promotion of social intercourse and rational amusement among its members"; that the said club acquired and own certain lands and fishing rights in certain streams in Ulster County in the State of New York, and upon said lands has erected a cabin and other buildings and has made improvements upon said lands.

Denies that at the time these proceedings were commenced the said J. Q. A. Ward was and now is trustee of said club.

Admits that said club own the property referred to in subdivision 5 of the schedule annexed to said petition, but denies that such property is, or at the time of filing of said petition was, all the property or rights owned by said club.

3. Denies each and every allegation in said petition contained except as hereinbefore admitted or denied.

Wherefore, the respondent, said Edward N. Whiton, demands that these proceedings be dismissed with costs against the said petitioner.

J. ALEXANDER KOONES,

Attorney for Respondent, E. N. WHITON.

(Add verification.)

In the report of the referee a bare statement that the schedules annexed to the petition are correct is not a compliance with this section. *Matter of Pyrolusite Manganese Co.*, 29 Hun, 429. On the hearing the question as to whether the proceedings are being taken in bad faith and for fraudulent purposes and with intent to defraud the stockholders can be determined, and the dissolution can be opposed upon those grounds. *Jewett v. Swan*, 19 Week. Dig. 144.

Precedent for Referee's Report.

(Title, proceeding as in order.)

To the Supreme Court of the State of New York :

I, the undersigned, the referee to whom a reference was made by an order of this court, made at a Special Term thereof, held, etc., at, etc., on the 20th day of January, 1897, requiring all persons to show cause before me at, etc., on, etc., why the James Cement Company should not be dissolved, do hereby respectfully report :

Art. 4. Hearing and Proceedings Thereon.

That due proof having been made by affidavit which is hereto annexed of the publication of said order as thereby required, I proceeded, at the time and place last aforesaid, to a hearing of the matters so referred, being attended by L. B. Van Gasbeck, Esq., the counsel for the petitioner, and also by S. B. Sharpe, attorney for John B. Walker, a stockholder. That I thereupon heard the proofs and allegations of the said parties, and took the testimony in relation to the matters set forth in said petition, and also in regard to such other matters and things pertaining to the affairs of said corporation as were brought before me, which testimony, duly subscribed by the respective witnesses, and certified by me, is hereto annexed.

I further report that the schedule "A," annexed to said petition, is just and true, with the exception of several items of personal property contained in the additional schedule hereto annexed, marked "F," which I find belongs to said corporation, and are to be added to said schedule, and with the exception of several debts of the said corporation, proved before me and not entered on said schedule, and which are contained in the additional schedule hereto annexed, marked "G," which shows the name of each of said creditors, the sum due him, his place of residence, the nature of the debt, and the true cause and consideration of the indebtedness, and I find and determine the facts relating to said corporation accordingly.

And I further report that the following is a statement of the effects, credits, and other property, and of the debts and engagements of the said corporation, and of all other matters pertaining to its affairs, viz. : (state them.)

I return herewith the said original petition and the schedules annexed thereto, which have been transmitted to me for use upon such hearing by the clerk of Ulster County, upon my written order, and are annexed to this, my report, and made a part thereof.

All of which is respectfully submitted.

Dated March 10, 1897.

W. S. FREDENBURGH,

Referee.

Where, in a proceeding for the voluntary dissolution of a corporation which has an equal number of trustees equally divided respecting its management, the petitioner neglects or refuses, after the referee has been appointed, to apply for a final order as contemplated by § 2428, it is competent for the court, on special application of any person interested, to direct the petitioner to move, so that the interests of all may be protected. If all the parties to such a proceeding appear before the court for the purpose of procuring a final order, the court is authorized to dispose of the matter, although no formal notice has been given to the petitioner. When the petitioner has filed the referee's report, but does not apply for the final order, and all the parties appear before the court on an order obtained by one

 Art. 5. Final Order.

of them requiring the petitioners and the other parties to show cause why the final hearing should not be had, and the proceeding dismissed and a dissolution denied, the court acquires jurisdiction on notice to the attorney-general to make a final order dissolving the corporation, on the default, on an adjourned day, of the party who moved for a denial of dissolution, where the circumstances show that the motion was in effect and in contemplation of the parties an application for a final hearing of the proceeding upon the merits. *Matter of Peckamose Fishing Club*, 151 N. Y. 511, motion for re-argument denied, 152 N. Y. 629.

On a motion to vacate the order appointing temporary receivers, it is not permissible to show by the affidavits of directors that the value of the assets shown by the schedule were erroneous, and at the time when the application was made, four months after the proceeding was commenced, that the corporation was insolvent. The amendments to such a schedule permitted by § 2427 contemplated an increase of the schedule, not a decrease. *Matter of Hitchcock Manfg. Co.*, 1 App. Div. 164.

Parties to a proceeding for dissolution after becoming such are entitled to notice of any application made therein. *Matter of Wendler Machine Company*, 2 App. Div. 16, 72 St. Rep. 499, 37 Supp. 444.

ARTICLE V.

FINAL ORDER. § 2429.

SUB. 1. WHEN FINAL ORDER GRANTED. § 2429.

2. RECEIVER; HIS POWERS AND DUTIES.

SUB. 1. WHEN FINAL ORDER GRANTED. § 2429.

§ 2429. [Am'd, 1895.] Final order.

Upon an application for a final order, if it appear to the court, in a case specified in § 2419 of this act, that the corporation is insolvent, or, in a case specified either in that section, or in § 2420 of this act, that, for any reason, a dissolution of the corporation will be beneficial to the interests of the stockholders, not injurious to the public interests, the court must make a final order, dissolving the corporation, and appointing one or more receivers of its property. Upon the entry of the order, the corporation is dissolved. The court may, in its discretion, appoint a director, trustee, or other officer, or a stockholder of the corporation, a receiver of its property. In a proceeding for the voluntary dissolution of a corporation the court may, in the furtherance of justice, upon notice to the attorney-general, and the attorney-general not objecting, and upon such further notice to creditors or others interested as the court shall direct, which notice may be made by mail upon all persons and corporations not residing or existing within the State, relieve a receiver from any omission, defect, or

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default, in any proceeding or act required by law to be taken or done, or in the giving of any notice required by law to be given, and the court may, upon like notice, confirm any act of a receiver, and any decision, report, order, or judgment made in such proceeding.

The act of 1870, providing that a receiver of a corporation other than a manufacturing corporation could only be appointed in a civil action, manifestly referred to a corporation in existence, and not to one which is dissolved, and in such case a receiver may be appointed on the application of either the trustees or a creditor. *Matter of Pontius*, 26 Hun, 232. As to when action can be maintained to dissolve corporation on account of violent dissensions and irreconcilable differences among the members, see *Fischer v. Raab*, 57 How. 87. On the dissolution of a corporation the trustees must convert the assets into money. They cannot invest them in stock of another corporation without the consent of all the stockholders. *Frothingham v. Barney*, 6 Hun, 366. Where a corporation is dissolved because the trustees cannot agree the court may, after the payment of the liabilities and expenses of the receivership, order a sale and distribution of the remaining assets. *Ex parte Woven Tape Skirt Co.*, 8 Hun, 508. The title of the receiver does not vest till his bond is filed, and a creditor may obtain a lien by judgment or attachment between the appointment and filing of the bond. *Chamberlain v. Rochester, etc., Co.*, 7 Hun, 557; see *Matter of Eagle Iron Works*, 8 Paige, 385; *Matter of Berry*, 26 Barb. 55. Mr. Bliss in his Annotated Code calls attention to the fact that §§ 66 to 89 (2 R. S. 468), relating to receivership, are excepted from the Repealing Act of 1880, chapter 245, and made applicable to this section, and quotes the section and cites a number of authorities where action has been brought by stockholders or in the name of the people, bearing on these sections. On the voluntary dissolution of a corporation its officers are not prohibited from being appointed receivers. *Matter of Eagle Iron Works*, 8 Paige, 385.

Art. 5. Final Order.

Precedent for Order Dissolving Corporation.

At a Special Term of the Supreme Court, held in and for the State of New York, at the court-house in the city of Kingston, on the 20th day of June, 1897 :

Present :—Hon. Alton B. Parker, *Justice*.

SUPREME COURT.

In the Matter of the Voluntary Dissolution of
The James Cement Company. }

Upon reading and filing the report of W. S. Fredenburgh, Esq., referee, duly appointed herein by an order of this court, made at a Special Term thereof, held at the court-house in the city of Albany, dated, etc., with notice of motion for a final order thereupon, and upon all the papers and proceedings herein, with proof of due service as required by law and as therein required, of the order to show cause, made herein, on the 20th day of June, 1897, and of due service of said notice upon each person who has made himself a party to these proceedings by filing with the clerk before the close of the hearing before the referee, a notice of his appearance as required by law, and upon the attorney-general, and it appearing to the court that the said James Cement Company is insolvent, that it will be beneficial to the interests of the stockholders and not injurious to the public interests for the following reasons, viz.: (state them).

It is hereby ordered that the said James Cement Company be, and the same is, hereby dissolved, and that Amasa Humphrey, banker, of the city of Kingston, Ulster County, be, and he is hereby, appointed receiver of the property thereof, upon executing, acknowledging, and filing with the clerk of this court a bond, in the form required by law, to the people of this State, in the penalty of \$20,000, with two sufficient sureties, to be approved by a justice of this court, conditioned for the faithful discharge of his duties as such receiver.

And it is further ordered, that said receiver be empowered to take immediate charge of, and sell at his discretion, at public or private sale, the said property and assets of said company, and to collect the debts due to said company.

And it is further ordered, that both the plaintiff and defendant be, and they hereby are, enjoined from in any way using, controlling, interfering with, or incumbering said company property, and from collecting any debts due said company, or paying out any moneys belonging to said company, until the further order of this court.

Enter in Ulster County.

A. B. PARKER,
Justice.

Art. 5. Final Order.

Order Dissolving Corporation.

At a Special Term of the Supreme Court, held at the court-house in the city of New York, on the 25th day of October, 1895 :

Present :—Hon. Miles Beach, *Justice*.

In the Matter of the Application of one of the two Trustees of the Peekamose Fishing Club for its voluntary dissolution.

151 N. Y. 511.

The petitioner, John Q. A. Ward, having, upon his duly verified petition and schedules, procured on the 21st day of May, 1894, an order from this court dated that day, directing all parties interested in the Peekamose Fishing Club to show cause at a Special Term of this court on the 24th day of August, 1894, why said corporation should not be dissolved; and said motion having come on to be heard, and an order having thereupon been made dated the 30th day of August, 1894, appointing Augustus C. Brown referee herein, to hear the allegations and proofs of all parties and determine the facts and report the same in writing with all convenient speed to this court; and Anthony W. Dimock, having appeared herein by B. C. Chetwood, his attorney, and having interposed an answer to said petition, and subsequently Edward N. Whiton and Louis E. Howard having been made parties to this proceeding by an order of this court dated the 7th day of February, 1895, and said Edward N. Whiton having appeared by J. Alexander Koonen, his attorney, and having interposed an answer to the petition herein, and the said Louis E. Howard having appeared herein by B. C. Chetwood, his attorney, and the matters so referred to said Augustus C. Brown, Esq., as referee, having been duly heard before him, and the said referee having duly made and filed his report in writing dated the 30th day of July, 1895, and filed in the office of the clerk of the city and county of New York on the 24th day of August, 1895, and copies of said report and notice of filing thereof having been duly served upon Hon. T. E. Hancock, attorney-general, and on _____ and _____ (insert names of other attorneys appearing), and the said Dimock and Whiton having filed exceptions to the said referee's report;

Now, therefor, upon the petition herein and the schedules thereto annexed, the order dated the 21st day of May, 1894, and proof of due service and of publication thereof, and upon _____ (insert other moving papers), and upon the report of Augustus C. Brown, Esq., referee, and proof of service of a copy of said report, with notice of filing, upon the attorney-general of the State of New York, and upon the attorneys for the various respondents herein, and upon the exceptions to said report filed by said respondents, and upon the order to show cause dated August 30th, 1895, made by Mr. Justice Beekman, and a copy of this order, as proposed, with notice of settlement thereon, having been duly served upon the attorney-general, and on motion of McClure, Turner & Rolston, attorneys for the petitioner, it is

Art. 5. Final Order.

Ordered, that the exceptions to the report of Augustus C. Brown, Esq., referee, filed herein by Dimock and Whiton, be and the same hereby are overruled, and that the said report be and the same is hereby confirmed.

And it appearing to the court that the allegations in the petition herein are true, and that said corporation has but two trustees, and that they are equally divided respecting the management of its affairs; and it further appearing to the court that the dissolution of the Peekamose Fishing Club will be beneficial to the interests of said corporation and not injurious to the public interest, it is

Ordered, that said corporation, the Peekamose Fishing Club, be and the same hereby is dissolved. And it is further

Ordered, that William H. Ricketts, Esq., be and he hereby is appointed receiver of all the property of said corporation with all the powers of such receivers. It is further

Ordered, that said receiver before entering upon his duties shall make and file with the clerk of the city and county of New York a bond to the People of the State of New York, in the penalty of four thousand dollars (\$4,000), conditioned for the faithful discharge of his duties as such receiver, and for the due accounting for all the moneys received by him. And it is further

Ordered, that the State Trust Company be and the same is hereby designated as the place of deposit wherein all the funds of the said corporation not needed for immediate disbursement shall be deposited. It is further

Ordered, that said receiver shall give notice of his appointment, which notice shall contain the matters required by law in notice of trustees of insolvent debtors, and in addition thereto shall require all persons holding any open or subsisting contract of such corporation to present the same in writing and in detail to such receiver at a time and place in such notice specified; and that said notice be published for three weeks in the New York Law Journal, being a newspaper printed in the county of New York, where the principal place for the conduct of the business of such corporation was situated, and in the New York Times, newspapers published in the said county of New York, which is hereby designated in place of the State paper. It is further

Ordered, that the petitioner recover his costs and disbursements herein, to be taxed by the clerk, and that the amount thereof be paid by the said receiver out of the moneys that may come into his hands.

MILES BEACH,
Justice Supreme Court.

A corporation organized under chapter 228, Laws 1877, providing for the organization of exchanges or boards of trade, may be dissolved by the court upon petition and consent of a large majority of its trustees and members, when it appears that it is doing no business, because of the diverse interests of its members, although the corporation is solvent, and the minority of the

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trustees and members oppose the dissolution. When it appears that the interests of the stockholders of such a corporation are so discordant as to prevent efficient management, and that the large majority of its trustees and members wish to wind up its affairs by dissolution, the fact is established that the dissolution will be for the interests of the stockholders. *Matter of Application of Trustees of the Importers and Grocers' Exchange for a Voluntary Dissolution*, 132 N. Y. 212, 43 St. Rep. 625, affirming 15 Daly 419, 28 St. Rep. 446, 8 Supp. 322, which reversed, 18 St. Rep. 175, 2 Supp. 257.

Directors of a corporation have the legal power to commence proceedings for a voluntary dissolution, and it is their duty to do so, if for any reason they deem it beneficial to the interests of the stockholders that the corporation should be dissolved. It is not necessary that the corporation should be insolvent in order to justify the proceedings for dissolution and the final dissolution of the corporation. So held where a corporation had concededly been losing their money every year for the last ten years, and the dividends had, during that whole time, been paid, not from the net earnings of the company, but from the surplus on hand. *Jameson v. Hartford Insurance Fire Co.*, 14 App. Div. 380, 44 Supp. 15, 78 St. Rep. 15.

The words, "beneficial to the interests of the stockholders," in § 2429, were not intended to make it mandatory upon the court to decree a dissolution in cases where it would be beneficial to a majority of the stockholders, when the best interests of the minority demand a continuance of the corporation's existence. The intention is to confide a discretionary power to the court to order a dissolution if, in its opinion, and viewing all the circumstances of the case, the best interests of the stockholders will be subserved thereby. In the exercise of such discretion, the court is bound to consider the interests of the minority as well as the majority. *Matter of Importers and Grocers' Exchange*, 18 St. Rep. 175, reversed, 28 St. Rep. 446, 15 Daly 419, affirmed, 43 St. Rep. 625, 132 N. Y. 212.

Where the report of the referee on a petition for dissolution enumerates more books of the corporation than are contained in the schedule annexed to the petition, the discrepancy is not a ground for refusing final order, the trustees having made the schedule in good faith. *Matter of Santa Eulalia Silver Mining*

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Co., 2 Supp. 221, affirmed, 21 St. Rep. 89. Where a corporation has gone into liquidation, the rights and debts of the parties would be fixed and the assets of the corporation would be best protected by enjoining all suits and expenses, except as might be necessary in adjusting the respective debts in liquidation. The effect of a voluntary dissolution of a corporation is to place all its property and all its assets in the custody of the law to be collected and applied by a person appointed by the court. *Walsh v. Seager Bros.*, 1 St. Rep. 189.

The omission of a receiver of an insolvent corporation appointed in proceedings for voluntary dissolution to serve upon the attorney-general notice of an application for an order to sell its property, is cured by a subsequent order of the court made upon due notice to the attorney-general confirming such sale and directing the re-entry of an order therein *nunc pro tunc*. The case comes under § 2429 of the Code of Civil Procedure. Upon the confirmation by the court the title of the purchaser at the sale becomes effective. It is immaterial if stockholders of the corporation received no notice of the application for the order of confirmation. *Johnson v. Rayner*, 25 App. Div. 598.

Upon the dissolution of a corporation actions for personal injuries pending against it on trial abate and cannot be reviewed or continued against the receiver. The rule in such actions is the same as where the defendant is a natural person, and the cause of actions dies with the death of the tortfeasor. As the law now stands the dissolution of a corporation apparently defeats causes of action against it by any person, however meritorious. *Matter of New York Oxygen Co.*, 67 St. Rep. 549, 33 Supp. 726, 24 Civ. Pro. 398, citing *Grafton v. Union Ferry Company*, 46 St. Rep. 549; *Sturges v. Vanderbilt*, 73 N. Y. 384; *McCulloch v. Norwood*, 58 N. Y. 562. It is held, in *People v. American Steam Boiler Insurance Company*, 14 Misc. 162, that notice to the attorney-general of an application for an order of reference of a disputed claim against the corporation made upon a stipulation between the claimant and the receiver is not essential to the validity of the order and the proceeding before the referee.

SUB. 2. RECEIVER; HIS POWERS AND DUTIES.

Under Article III., relating to the appointment of temporary receivers, attention has been called to the difficulty in defining the

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powers and duties of receivers. An attempt is made here to cite some of the leading authorities, a fuller citation will be found in Fiero on Special Actions under "Actions to Dissolve Corporations," p. 1087, etc. See, also, p. 1161, for precedents on application to the court by receivers which are in most instances applicable to receiverships under this proceeding.

Act to facilitate the collection of assets by receivers of corporation. Laws 1898, chapter 534. Act authorizing receivers of corporations appointed in actions or special proceedings to sell the property at private sale and ratifying such sales heretofore made. Laws 1898, chapter 522.

Labor Law, § 8, ch. 415, Laws 1897, provides for preferences in payment of wages of employes. Chapter 282, Laws 1896, regulates place where application for appointment of receivers must be made. Chapter 558, Laws 1896, prohibits appointment of certain officers in New York and Kings as receivers.

By the proper presentation to a State court, after due notice of the application, of a petition praying for the dissolution of a corporation and upon the appointment of a receiver, the court acquires jurisdiction of the subject-matter, and although the receiver has not actually taken the property of the corporation into his manual possession, the jurisdiction of the court over it is exclusive. The appointment of the receiver is completed by the filing and entering of the order appointing him, although he may be directed to execute and file a proper bond before he proceeds to discharge his duties; when that is done he can take actual manual possession of the property and his title relates back to the date of appointment. No other court, therefore, either Federal or State, can obtain jurisdiction over the property after the filing and entry of the order, even under process upon which possession was taken prior to the filing of the bond. *Matter of Schuyler, S. T. B. Co.*, 136 N. Y. 169.

The receiver of an insolvent insurance company who continues to occupy the premises is liable for the accruing rent. *People v. Universal Life Insurance Co.*, 30 Hun, 142. One who is employed by a receiver in matters pertaining to the execution of the trust, must look to him in his individual capacity for his compensation, the receiver's contract does not bind the estate. *Ryan v. Rand*, 20 Abb. N. C. 313, 9 St. Rep. 523. The receiver, who, without an order of the court, runs a hotel, was held in-

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dividually liable for supplies furnished the hotel. *Sayles v. Jordan*, 2 N. Y. Supp. 827, 19 St. Rep. 349, affirmed without opinion, 121 N. Y. 685. A receiver of a railroad who operates and controls it, is liable for injuries of his employes to the same extent as the company would have been. He cannot absolve himself from liability for not keeping the tracks in good condition by showing the lack of funds. *Graham v. Chapman*, 33 St. Rep. 349, 11 Supp. 319. The nature and extent of the liability of a receiver on turning over assets to his successor under the order of the court is discussed in *Clapp v. Clapp*, 27 St. Rep. 180, 7 Supp. 495, affirmed without opinion, 125 N. Y. 693. The court may appoint a receiver to carry on a business in a proper case. *Jackson v. DeForest*, 14 How. Pr. 81; *Smith v. N. Y. Consolidated Stage Co.*, 28 How. Pr. 377, 18 Abb. Pr. 419; *Heatherton v. Hastings*, 5 Hun, 459. If receivers of an insolvent corporation, appointed on its voluntary dissolution, fail to serve the attorney-general with notice of the application for an order for the sale of the corporate property, such omission is cured by a subsequent order of the court made upon notice to the attorney-general, confirming such sale, and directing a re-entry, *nunc pro tunc*, of the order authorizing the sale, and upon such confirmation, the title of the purchaser becomes complete, and it is immaterial whether the stockholders of the corporation have notice of the application for the order of confirmation. *Johnson v. Rayner*, 25 App. Div. 599, 49 Supp. 959, 83 St. Rep. 959, 27 Civ. Pro. 102. An action for personal injuries arising through the negligence of a corporation, not incorporated, so far as the record shows, under the act for the organization and regulation of business corporations, Laws 1875, chapter 611, nor under the business corporations law, Laws 1892, chapter 691, does not survive a voluntary dissolution of the corporation and an appointment of a receiver, and therefore the court has no power to permit the action to be continued against such receiver. *Matter of Yuenling Brewing Co.*, 24 App. Div. 223. A receiver of an insolvent corporation has no title to property which the corporation had transferred by a general assignment without preferences before the commencement of the action in which he was appointed; and if he desires to assail the title of the assignee he must do so by action, and not by motion to punish the assignee for contempt in refusing to surrender the property on demand. *Peo. v. U. S. Law Blank*

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& Stationery Co., 24 Misc. 535, 33 Supp. 852, 86 St. Rep. 852, 27 Civ. Pro. 351.

Under an order authorizing him to continue the business and make up and dispose of such goods as he can manufacture at a profit for such period of time as to him seems beneficial to the creditors and stockholders, or until the further order of the court, and to make contracts therefor, the receiver of a corporation has no authority to contract for the future making and delivery of goods within a specified time, and he cannot recover for a loss of profits in case of a breach of such a contract by the failure of the other party thereto.—Sup. Ct., Sp.T., 1898. *Matter of Punnett Cycle Mfg. Co.*, 24 Misc. 310, 53 N. Y. Supp. (87 St. Rep.) 204.

An order of the court is not necessary in order that the receiver may have authority to sell a claim; it is simply a protection to him against a charge that he has exercised his discretionary power unwisely in so doing. *Higgins v. Herrmann*, 23 App. Div. 420, 48 Supp. 244, 82 St. Rep. 244. A receiver of an insolvent corporation is not bound to complete its contracts; but where he does so with the consent of all the parties interested, the cost of completion is chargeable against special creditors who have an assignment of, or lien upon, the proceeds of such contract, and is to be deducted therefrom before they are paid over; but the special creditors may prove such costs against the general fund and share *pro rata* with the general creditors. *Matter of A. E. Chasmar & Co.*, 22 Misc. 680, 50 Supp. 1105, 84 St. Rep. 1065.

An action to set aside transfers made by a judgment debtor cannot be maintained by a receiver whose appointment was invalid, although the complaint is amended so as to set forth subsequent valid appointment, as in such case no cause of action existing at the commencement of the action is shown. *Banigan v. Village of Nyack*, 25 App. Div. 150, 49 Supp. 199, 83 St. Rep. 199. An order authorizing a receiver to take advice of counsel as to a defence is proper. *Troy Savings Bank v. Morrison*, 27 App. Div. 423, 50 Supp. 225, 84 St. Rep. 225. Where a receiver refuses to receive goods under a contract made by the corporation, no title thereto passes to him so as to prevent the vendor from reselling, for the purpose of fixing the amount of damages, without leave of court. *Moore v. Potter*, 155 N. Y. 481, 50 N. E. Rep. 271, reversing 87 Hun, 334, 34 Supp. 212, 68 St. Rep. 60,

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Where the creditors and stockholders had notice of the original application, failure to serve them with the notice of the application to confirm does not affect the purchaser's title. *Johnson v. Raynor*, 25 App. Div. 598, 49 Supp. 959, 83 St. Rep. 959, 27 Civ. Pro. 102. Proof of an agreement by the purchaser to pay the claim of a creditor of the corporation if he abstained from bidding, without any evidence that it was acted upon by the parties or of inadequacy of consideration, is not sufficient to invalidate the sale. *Johnson v. Raynor*, 25 App. Div. 598, 49 Supp. 959, 83 St. Rep. 959, 27 Civ. Pro. 102.

Where the petitioner, having leave to sue a receiver, asserts that his claim has been admitted to be due, no action against the receiver should be allowed to establish it, and the court will make no order to pay it unless it appears that the receiver has assets sufficient to pay all the other creditors also. *Matter of Machwirth*, 15 App. Div. 65, 44 Supp. 80. A temporary receiver is an officer and representative of the court, and is at all times entitled to its advice and protection. *Pro. v. St. Nicholas Bank*, 76 Hun, 522, 58 St. Rep. 843, 28 Supp. 114. A receiver should not apply to be authorized to employ any particular attorney. *First Nat. Bank of Rondout v. Navarro*, 43 St. Rep. 813, 17 Supp. 900. Where a receiver is regularly appointed, he is vested with all the right and authority of his office, although his former appointment as temporary receiver was illegal. *Matter of Stonebridge*, 37 St. Rep. 617, 13 Supp. 770. A receiver appointed to care for and preserve property during the pendency of an action to settle conflicting claims thereto, is a mere stakeholder and should not be permitted to intervene in such a controversy. *Nat. Park Bank v. Goddard*, 48 St. Rep. 744, 20 Supp. 526. The appointment of a successor to the receiver pending an action brought by him does not suspend its prosecution until substitution of the new receiver. The action may be prosecuted in the name of the original plaintiff unless a substitution is applied for. The complaint will not be dismissed in an action brought by the receiver because there was no proof that he had filed a bond, where it appears that the order appointing him required a bond, and that he was subsequently ordered by the court to bring suit on the claim in question. *Hegewisch v. Silver*, 140 N. Y. 414, 55 St. Rep. 808.

An order appointing a receiver on the voluntary dissolution

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of a corporation will not be amended to permit entry of judgment in prior attachment actions in which the receiver had not been substituted, or to which he was not a party. *Matter of Vertical Tube & Boiler Co.*, 59 Supr. Ct. 433, 38 St. Rep. 528, 14 Supp. 478. A receiver is not liable for rent or taxes which had accrued prior to his appointment. *Moore v. Higgins*, 24 St. Rep. 378, 5 Supp. 893, 2 Silv. S. Ct. 298.

Where defendant in this State was appointed receiver of a corporation and employed plaintiff to care for the property, it was held that, in the absence of an express agreement to exonerate the receiver, he was individually liable. *Rogers v. Wendell*, 54 Hun, 540, 28 St. Rep. 301, 7 Supp. 781, citing *Schmitter v. Simon*, 101 N. Y. 557; *Willis v. Sharp*, 113 N. Y. 586; *Austin v. Munro*, 47 N. Y. 360; *Noyes v. Blakeman*, 5 N. Y. 567; *Mygat v. Wilcox*, 45 N. Y. 306; *Patton v. R. B. P. Co.*, 114 N. Y. 4; *Vilas v. Paige*, 106 N. Y. 439. A temporary receiver, in an action to dissolve a corporation, who was not authorized by the court to continue the business or to sell the property, was held not to be authorized to employ truckman, and the latter could not maintain an action for wages against the receiver in his representative capacity. *Myer v. Lexow*, 1 App. Div. 116, 72 St. Rep. 220, 37 Supp. 67, citing *Sayles v. Jourdan*, 19 N. Y. 349; *Ferrin v. Myrick*, 41 N. Y. 315; *Rogers v. Wendell*, 54 Hun, 540. A receiver may bring suits in any court under his general authority. *Rockwell v. Merwin*, 45 N. Y. 166. To show the authority of a receiver to sue, it is sufficient to produce the petition, the order appointing him, and his official bond. *Palmer v. Clark*, 4 Abb. N. C. 25. The receiver of an insolvent corporation has power to maintain a suit, to set aside a judgment against it, on the ground that it was without consideration, obtained by collusion with the officers and in fraud of creditors. *Whittlesey v. Delaney*, 73 N. Y. 571. The receiver of a corporation may maintain an action to determine the validity of bonds claimed to be secured by a mortgage on its property. *Hubbell v. Syracuse Iron Works*, 42 Hun, 182. And to set aside a mortgage on the ground that the written consent of the holders of two-thirds of the capital stock was not secured. *Vail v. Hamilton*, 85 N. Y. 453. To disaffirm or set aside illegal or fraudulent transfers of corporate property made by agents or officers thereof, or to recover funds or securities invested or misapplied. *Attorney-General v. Guardian Mutual Insurance*

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Co., 77 N. Y. 272. A receiver has power to prosecute a pending action; it does not abate by his appointment. *Phoenix Co. v. Badger*, 67 N. Y. 294. An action brought against a receiver without the permission of the court will be stayed on motion. *DeGroot v. Jay*, 30 Barb. 483, 9 Abb. Pr. 364, but such suit is regular until the court interferes and a judgment therein is valid. *Hackley v. Draper*, 4 T. & C. 614, affirmed 60 N. Y. 88. The omission to obtain leave to sue the receiver is not jurisdictional, although not doing so is a contempt. If the contempt be not wilful, leave to sue may be granted *nunc pro tunc* on terms which will indemnify the receiver. *James v. James Cement Co.*, 8 St. Rep. 490. The commencement of an action against a receiver without leave does not affect the jurisdiction of the court, but the remedy is by motion to stay proceedings, or the punishing of plaintiff for contempt. In a proper case leave to sue will be granted *nunc pro tunc*. *Hirshfeld v. Kalischer*, 81 Hun, 606, 30 Supp. 1027, 63 St. Rep. 220. On an application to punish a party for contempt for suing the receiver of a corporation without leave of the court, notice of such application must be given the attorney-general. *Langdon v. N. Y. Book Co.*, 39 St. Rep. 167, 14 Supp. 308, 20 Civ. Pro. 280. The right of a person who has a lien on property to hold possession of it is not affected by the recovery of judgment for the amount of the indebtedness and the lienor has a right to foreclose his lien and make the defendant's receiver a party, and should have leave to sue the receiver for that purpose. *Pate v. Hoffman*, 40 St. Rep. 915, 61 Hun, 386, 16 Supp. 74. Where a corporation is sued for an alleged trespass and attempts to justify under an agreement with a receiver who never authorized the act complained of, such a fact does not make the action one against the receiver, so as to require leave of the court for its prosecution. *Farnsworth v. Western Union Telegraph Co.*, 6 Supp. 735, 25 St. Rep. 393. A receiver may maintain an action to determine priorities between conflicting claims to the fund remaining in his hands after final judgment. *Bamberger v. Fillenbrown*, 12 Misc. 328, 33 Supp. 614, 67 St. Rep. 321. Where a receiver brings an action or proceeding, it is sufficient to allege that he has been appointed receiver, but where the answer denies the validity of his appointment he is bound to prove it before he can recover. *Matter of O'Connor*, 47 St. Rep. 415, 19 Supp. 971. Where the receiver is required to file a bond

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as a condition precedent to taking and holding possession of the property, proof of the filing of the bond is necessary to the maintenance of an action by him as receiver. *Hegewisch v. Silver*, 50 St. Rep. 448, 23 Civ. Pro. 41, 21 Supp. 294.

Leave will not be granted, while a receiver is discharging his duties in the manner directed by the court, to bring an action against him charging that he is a trespasser in so doing. *Hardt v. Levy*, 79 Hun, 351, 61 St. Rep. 40, 29 Supp. 375.

No creditor of a corporation can sue the receiver, or obtain payment out of the property of the corporation, except by consent of the court. The court may authorize the receiver to sue on his application, or it may hear the claim upon affidavits, or oral evidence; or where a claim is disputed it may order a reference. *Matter of N. Y. & W. U. Tel. Co. v. Jewett*, 115 N. Y. 166, 21 New Eng. Repr. 1036, 24 St. Rep. 560, affirming 43 Hun, 565, 6 St. Rep. 656. A temporary receiver may maintain an action to recover moneys collected under a judgment entered against a corporation, upon an order made in contemplation of insolvency, and the corporation is not a necessary party to such an action. *Nealis v. American Tube & Iron Co.*, 150 N. Y. 42, 44 New Eng. Repr. 944 affirming 76 Hun, 220, 27 Supp. 733, 59 St. Rep. 120. It is proper to deny a motion to direct the receiver of a corporation to sue directors, where notice of the motion has not been given to all the persons to be proceeded against. *Peo. v. Life Union*, 84 Hun, 560, 32 Supp. 1148. Where a receiver has been directed by the court to bring an action against certain directors of a bank, and neither the receiver, creditor, nor the stockholders appeal from the order, the court will not reverse the order upon an appeal by the directors, even though they are also stockholders. *Peo. v. Com. Bank*, 6 App. Div. 194, 39 Supp. 1000.

A foreign receiver can sue in this State, where there are no local interests adverse to the suit. *Dyer v. Power*, 39 St. Rep. 136, 14 Supp. 873. And receivers of a foreign corporation appointed by the United States court may be sued in the courts of this State, where permission to do so is granted by the court which appointed them. *Carrey v. Spencer*, 36 Supp. 886, 72 St. Rep. 108. An ancillary receiver of a foreign corporation, unless the order of appointment provides otherwise, has only the powers of a temporary receiver, and cannot maintain an action in

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determination of the fraudulent transfer by the corporation. *Buckley v. Harrison*, 10 Misc. 683, 31 Supp. 999, 65 St. Rep. 93. An action for tort against a receiver of a corporation may be maintained, although committed by the corporation before his appointment. *Decker v. Gardner*, 33 St. Rep. 541, 11 Supp. 388; see *Decker v. Gardner*, 124 N. Y. 334.

A receiver of a railroad is held liable for injuries to employees, in the same manner and to the same extent as the corporation would be held had it not gone into the hands of a receiver, although there is a lack of funds. *Huber v. Wilson*, 33 St. Rep. 849, 11 Supp. 378, citing *Durkin v. Sharp*, 88 N. Y. 225; *Fuller v. Jewett*, 80 N. Y. 46. A receiver of a corporation, although he has accounted and been discharged, may be compelled to account to parties from whom the corporation acquired property by fraud, or what he received from such property, unless his account was so stated that the order of discharge would be a defence. *Pondir v. N. Y., L. E. & W. R. R. Co.*, 31 Abb. N. C. 29, 72 Hun, 384, 55 St. Rep. 63, 25 Supp. 560.

The appointment of receivers of a corporation does not deprive its officers of the right to continue the defence of an action where there is no restraining order, and the receivers have no standing, unless made parties, to move to set aside the answer interposed, and judgment entered thereon and for leave to answer. *Farmers' Loan & Trust Co. v. Hoffman House*, 7 Misc. 358, 27 Supp. 634, 58 St. Rep. 684. A receiver in possession of property claimed by many persons, on the ground that the vendees had procured it by fraud, was properly directed to sell all the goods, and hold the proceeds subject to the order of the court. *National Park Bank v. Goddard*, 62 Hun, 31, 41 St. Rep. 439, 16 Supp. 343.

Where certain work was done, the employers agreeing that the employed should have a general lien upon the property, and a receiver was appointed for the employers, it was held that the lien should not be foreclosed, but the rights of the parties should be determined under the receivership. *Matter of Herbst*, 63 Hun, 247, 44 St. Rep. 173, 17 Supp. 760. A person having a judgment against a receiver, with the direction that the claim be paid out of a certain fund, cannot be deprived of his rights by a judgment in another action to which he was not a party, discharging the receiver. *Woodruff v. Jewett*, 115 N. Y. 267, 26

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St. Rep. 142, reversing 37 Hun, 205. In the absence of proof that the attaching creditor has obtained a lien upon sufficient assets to pay his judgment, the receiver of the debtor will not be directed to pay the judgment out of the assets in his hands. *Glines v. Supreme Sitting Order of the Iron Hall*, 50 St. Rep. 743, 21 Supp. 736.

Where merchants sent their bookkeeper to a bank with a letter inquiring as to its solvency, and directing a deposit if the answer was favorable, and the money was deposited, and two hours later the bank failed, a summary order asking the receiver of the bank to repay the money, was held to be improper, and the party was remanded to his action. *Matter of North River Bank*, 60 Hun, 91, 37 St. Rep. 931, 14 Supp. 261.

Chapter 376, Laws 1885, § 1: Where a receiver of a corporation created or organized under the laws of this State and doing business therein other than insurance and moneyed corporations, shall be appointed, the wages of the employes, operatives, and laborers thereof shall be preferred to every other debt or claim against such corporation, and shall be paid by the receiver from the moneys of such corporations which shall first come to his hands. See *People v. Remington & Sons*, 45 Hun, 329, holding that as this statute confers upon a class of persons having a contractual relation with corporations, new and unusual privileges and securities which diminish the rights and securities of all persons having claims not within the favored class, it is in derogation of the common law, and it should not be extended to cases not within the reason as well as within the words of the statute; nor should it be given a retroactive effect. That orders drawn on the defendant by laborers requesting the corporation to pay to the person named a certain sum of money and charge the same to the account of the drawer, did not effect an assignment of the wages due the drawer, and the payees therein were not assignees of the wages of the laborers or entitled to be preferred under the act. The preference secured by this statute is not a lien upon the property of the corporation, and does not become a legal right until a receiver is appointed. After the appointment of a receiver the preference springs into existence and becomes a legal right which is assignable. Where laborers received promissory notes for labor which were transferred to third parties, no preference was created by the statute. A superintendent

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employed at an annual salary and an attorney are not preferred within the statute, nor is a person employed upon an annual salary of \$2,000, with a commission of 2 per cent. on goods sold, entitled to a preference. The general word "employees" in chap. 376, Laws 1885, is to be construed as limited by the word "wages" and by the specific words "operatives and laborers," with which it is associated. It comprehends only persons performing the kind of service that is due from the latter; hence the statute does not include employees of a manufacturing corporation, such as bookkeepers, superintendents, and foremen, paid by the month, and performance of manual labor by whom, if performed at all, it is merely incidental to their general employment. *Matter of Stryker*, 73 Hun, 327, 55 St. Rep. 903, 26 Supp. 209.

It is said in *People v. Beverage Brewing Co.*, 91 Hun, 313, disapproving *Matter of Stryker*, 73 Hun, 327 (*supra*), that the statute should receive liberal construction, and that the word "employee" used in the statute has a wider significance than the words "laborers or operatives."

A person employed to assist the general manager of a corporation in keeping its books and to clean the office and show-room of the corporation, to assist in putting together and taking apart and shipping wire wicket-fence and weaving machines, is an employee within the preference of Laws 1885, chap. 376, and is entitled to preference at the hands of the receiver of the corporation. *Brown v. A. B. C. Fence Co.*, 52 Hun, 151, 23 St. Rep. 415, 5 Supp. 95, following *Gurney v. Atlantic R. R. Co.*, 58 Hun, 358, distinguishing *Krauser v. Ruckel*, 17 Hun, 463; *Dean v. De Wolf*, 16 Hun, 186; *Hill v. Spencer*, 61 N. Y. 274; *Wakefield v. Fargo*, 90 N. Y. 213; *People v. Remington*, 45 Hun, 329.

Where the petitioner made articles of machinery for defendant to be paid for at a fixed price for each article, defendant furnishing material, power, tools, etc., while the petitioner hired and paid the laborers who did most of the work, petitioners doing but little work on the machinery, it was held that they were not employees, operatives, or laborers within the statute. *People v. Remington*, 6 N. Y. Supp. 796, 25 St. Rep. 301, 3 Silv. 478.

In *Palmer v. Van Santvoord*, 17 App. Div. 194, 79 St. Rep. 354, 45 Supp. 354, it is held that a person employed by a mowing and reaping machine manufacturing corporation, setting up its ma-

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chines and taking them down to repair them, to go from place to place and set them up for farmers and to unpack and repack them, although also employed by the corporation to sell its machines, is entitled to a preference under the statute; affirmed, 153 N. Y. 612, holding that the purpose of the act of 1885 is that the debts of the corporation for the wages of employes, including in the designation all who in common understanding held that relation to the corporation, should be the first charge on the assets. It seems that bookkeepers or persons employed to make sale of merchandise, or of property manufactured by the corporation, are "employes" within the meaning of the act, and that their compensation earned is "wages," whether such persons are employed by the day, month, or year, and whether the compensation is designated "salary" or "wages" in the contract of employment.

Affidavit to Obtain Preference for Employee.

At a Special Term of the Supreme Court held at the chambers of Hon. E. L. Fursman, Justice, in the city of Troy, on the 16th day of June, 1897 :

Present :—Hon. E. L. Fursman, *Justice*.

In the Matter of the Application of Wilson E. Palmer for an order directing Seymour Van Santvoord and Danforth Geer, as receivers of the Walter A. Wood Mowing and Reaping Machine Company, to pay said Palmer his wages, etc., as a preferred creditor under the statute.

153 N. Y. 612.

STATE OF NEW YORK, }
COUNTY OF CAYUGA, } ss. :

Wilson E. Palmer, being duly sworn, says :

That from about the 4th day of September, 1895, to about the 1st day of November, 1895, deponent was employed by the Walter A. Wood Company as a laborer, operative, and employee. That said Walter A. Wood Company was a domestic corporation other than an insurance or moneyed corporation, viz. : a corporation for the manufacture and sale of certain agricultural implements.

That said corporation was duly organized under the laws of the State of New York, having its principal office at Hoosick Falls, in said State, and that heretofore and on or about the 15th day of December, 1895, the said Seymour Van Santvoord and Danforth Geer were duly appointed receivers of the said Walter A. Wood corporation as aforesaid.

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That they have duly qualified as such receivers and have entered upon the discharge of their duties.

That as deponent is informed by said receivers, the said receivers have in their hands as receivers as aforesaid a sufficient sum of money to pay off all the employes of the company.

That deponent was employed by the said Walter A. Wood Company to set up machines and to take them down and to fix the same when out of repair; to go from place to place and fix and set up machines of said company for farmers to whom the machines had been sold; to unpack machines and to repack them and ship the same to the company when necessary. Also to sell or solicit sales of the machines of said corporation, and did, in the discharge of his duties as employe, operative, and laborer of said company, sell machines for them, and that as such operative, employe, and laborer he set up and repaired machines for said company while in their employ as aforesaid; going from place to place so to do; take the machines from the railroad, unpack them, bolting together and screwing together the same, and did all of the necessary work to make said machines work, bolting them together and fitting them so that they would work, and that he performed manual labor as well as the labor of selling machines, obeyed and carried out the instructions, orders, and directions given to him by said corporation through its officers and agents.

That in and by his agreement with said company deponent was to receive the sum of \$100 per month for each and every month he remained in the employ of said company, together with his necessary travelling expenses, as wages, which were to be paid to him by said company at the end of each month.

That at the time of the dissolution of the company it was owing to deponent for his work as aforesaid the sum of \$141.54, being wages at the rate of \$100 per month, which was the agreed price as aforesaid for one month and eleven days. That there was also owing to deponent as wages the sum of \$127.77, money which had been necessarily expended by him in travelling from place to place according to the orders of said corporation while engaged in the performance of their work as aforesaid. It being understood and agreed that he was to be paid as his wages the sum of \$100 per month, together with such sum as was necessary for travelling expenses.

WILSON E. PALMER.

(Add verification.)

Order. (153 N. Y. 612.)

(Caption.)

(Title.)

On reading and filing the affidavit of Wilson E. Palmer, verified December 13, 1896, and notice of motion herein, and stipulation of the petitioner's counsel and receivers' counsel, and admission of service of the papers herein by the attorney-general, and the consent that said matter be determined at said Special Term; after hearing Mr. Parker on behalf of said motion made, and Mr. Welling-

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ton in opposition thereto on behalf of the receivers, the attorney-general not appearing, it is

Ordered, that so much of the prayer of the petition be granted as requests that the sum of \$141.54, being the sum actually earned by said Palmer as wages, be decreed to be preferred under the statute as wages of employe, operative, or laborer, and that the receivers pay it forthwith to said Wilson E. Palmer the said sum of \$141.54. It is further

Ordered, that the balance of the amount named in the petition, to wit, the sum of \$127.77, which has been expended by said Palmer in the business of said company, be disallowed as a preferred claim, and that said amount of \$127.77 be adjudged to be a general indebtedness of the corporation to be paid only among the unpreferred class of debts or general indebtedness.

This motion is granted without costs.

EDGAR L. FURSMAN,
J. S. C.

In Matter of Accounting of Scott as Assignee, etc., 148 N. Y. 588, it was held that the preference granted to wages of employes, by the General Assignment Act, was not nullified by the fact that the assignor had given the employe a promissory note for the amount of his wages, and that the preference granted under the General Assignment Act includes wages and salaries actually owing to former employes of the assignor at the time of the execution of the assignment, and is not limited to the wages and salaries of those in his employ at that time.

In Chapman v. Chumar, 26 St. Rep. 473, 7 Supp. 230, 4 Silv. 199, it was held that the bookkeeper of a manufacturing corporation is a servant within § 18, chapter 40, Laws 1848. An application to authorize the receiver of an insolvent corporation in proceedings for dissolution, to pay, as a preferred claim, out of the fund in his hands a reasonable allowance to counsel employed by the corporation for services rendered in the defence of the proceeding, is properly denied when it appears that by reason of the actual insolvency of the corporation, known to its officers, and of their attempt to continue it in business by fraudulent means, the employment of counsel to resist the proceeding was unjustifiable, although the counsel may have acted in good faith, and stopped the defence on discovering that the corporation was insolvent. *People v. Commercial Alliance Life Insurance Co.*, 148 N. Y. 563, affirming 91 Hun, 389, 36 Supp. 248, 70 St. Rep. 823. A travelling salesman on a yearly salary is an employe within the meaning of the statute giving a preference to the wages of

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employees, and others. *Matter of Fitzgerald*, 21 Misc. 226, 45 Supp. 630. A travelling salesman who receives commissions on his sales as wages, is an "employee" within the meaning of that term as used in § 1 of chapter 899, Laws 1895, and is entitled to a preference in payment. *Mayer v. Stern*, 22 App. Div. 628, 47 Supp. 965, 81 St. Rep. 965. The manager of a corporation, acting under a written contract to serve the corporation for one year as manager of a particular branch or department, and to devote his entire time and services to the management of the business of the corporation, and who has actual and absolute control of the business of the corporation, without interference of any person, is not entitled to a preference in the payment of his wages by a receiver, under Laws 1885, chapter 376, upon the voluntary dissolution of such corporation. *Matter of American Lace Works*, 30 App. Div. 321.

If premises leased to a corporation are vacated before the expiration of the term, on the appointment of a receiver in proceedings for a dissolution of a corporation, and the lessor, in accordance with the terms of the lease, re-enters and re-lets to a third party for the unexpired term at a less salary, the difference between the rent for the balance of the term reserved under the original lease, and that reserved under the sub-letting constitutes a definitely established claim against the corporation, which the receiver is empowered to recognize. The situation of a receiver of an insolvent corporation is less restricted than that of an assignee under a general assignment for the benefit of creditors, whose powers and duties are prescribed by that instrument. *People v. Saint Nicholas Bank*, 151 N. Y. 592, affirming 3 App. Div. 544, distinguishing *Matter of Hevenor*, 144 N. Y. 271, 63 St. Rep. 692. Taxes assessed upon the personal property of an insolvent corporation, and which became due subsequent to the levy of an attachment and execution thereon at the suit of creditors, are not a prior lien upon the assets in the hands of a receiver for distribution under the direction of the court, and which arose from the sale of the property subject to the levy. *Wise v. Wise Co.*, 153 N. Y. 507, affirming 12 App. Div. 319, 42 Supp. 54, 76 St. Rep. 54.

Unless a judgment creditor of a corporation, for which a receiver has been appointed, has acquired a statutory lien upon its assets prior to the appointment of the receiver, he is not entitled

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to a preference over other creditors, and his rights as creditor must be worked out through the receivership. *Mosher v. Supreme Sitting of Iron Hall*, 88 Hun, 395, 68 St. Rep. 755, 34 Supp. 816. A party loaning money to an embarrassed corporation, subsequently adjudged to be insolvent and taking security therefor, is not in a position which entitles him in equity to be adjudged to have a lien upon mortgaged property of the corporation or its proceeds in preference to bondholders of mortgages existing when the loan was made; and it is immaterial for what purpose the loan was made or how the money received thereon was applied, if the bondholders thereon were not parties to the transaction. *Farmers' Loan & Trust Co. v. Bankers & Merchants' Telegraph Co.*, 148 N. Y. 315, affirming 83 Hun, 560, 65 St. Rep. 35, 31 Supp. 1096.

A receiver appointed in proceedings for a voluntary dissolution, takes title to the assets upon the order of appointment, and no superior lien can be acquired by the levy of an attachment between the making of the order and the time the receiver takes possession. *Dickey v. Bates*, 13 Misc. 489, 35 Supp. 525, 70 St. Rep. 136. But the title of the receiver to the assets of a corporation does not relate back so as to divest the lien of the execution levied between his appointment and qualification, where the corporation had no defence to the action, but delayed recovery of judgment by interposition of a frivolous answer. *Matter of Lewis & Fowler Mfg. Co.*, 89 Hun, 208, 34 Supp. 983, 69 St. Rep. 44.

Where an execution issued upon a valid judgment against a corporation to the sheriff of the proper county, upon the same day as, but prior to the filing of an order appointing a temporary receiver of the property of the corporation, the execution, being prior in time, is entitled to priority over the title acquired by the receiver. *Matter of the Gies Lithographic Co.*, 7 App. Div. 550, 74 St. Rep. 704, 40 Supp. 146. The title of a receiver appointed in proceedings for the voluntary dissolution of a corporation relates back to the date of his appointment, and from that date the property is in the custody of the law and is not subject to attachment at the suit of a creditor of the corporation. *Matter of Christian Jensen Co.*, 128 N. Y. 550, 40 St. Rep. 621, 27 Abb. N. C. 303, affirming 59 Super. Ct. 552, 39 St. Rep. 379, 15 Supp. 144.

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The lien of an execution levied upon property of a corporation, after the filing of a petition for its voluntary dissolution, and before the appointment of a receiver, is valid as against the receiver. *Matter of Muchfeld & Haines Piano Co.*, 12 App. Div. 492, 42 Supp. 802, reported, 26 Civ. Pro. 90, *sub nom. Looschen v. Muchfeld & Haynes Piano Co.* Where a receiver was required to operate a railroad, keep up repairs, and pay for the same out of the income, with no provision for the payment of outstanding debts incurred for current expenses, it was held he was not bound to give a preference to employees. *Franklin Trust Co. v. Northern Adirondack R. R. Co.*, 11 App. Div. 249, 42 Supp. 211, 76 St. Rep. 211.

The proceeds of the property of a corporation in the hands of the receiver appointed in proceedings for its dissolution are properly applied to the payment of wages of employees due at the time the receiver was appointed, and wages of employees whose services were thereafter required in preserving the property and preparing it for sale as well as referee's fees, counsel fees, and expenses, including those of the receiver's attorney, and the money due on receiver's certificate authorized by the Court. *Matter of Muller & Co.*, 47 Supp. 277.

While the court has power to decree distribution of the funds of the corporation among those entitled thereto, it may not take from the trustee funds placed in his hands for the corporation for a specific purpose pursuant to a contract obligation and itself distribute them through its receiver instead of through the trustee. The authority of the court is limited to compelling the trustee to distribute the fund as provided for by the contract, under its supervision. Where a trust company had paid over the fund to the receiver pursuant to an order made without notice, it was held, the payment was not voluntary and the company could move the court to require the receiver to pay back so much of the fund as still remained in his hands. That as to the moneys paid out the receiver was entitled to be protected. As to payments made to the attorneys in the dissolution proceeding for their fees, it was proper to require them to pay back to the receiver the money so received by them, and to direct him upon receipt thereof to pay them over to the trust company. *Matter of the Home Provident Safety Fund Assn. of N. Y.*, 129 N. Y. 288, citing *Matter of Binghamton General Electric Co.*, 143 N. Y. 261, on the

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proposition that every lien upon the property of the corporation resting upon valid claims or process, before the appointment of the receiver, the lienor being in lawful possession, must be preserved with the right of enforcement. A judgment not entered until long after the appointment of the receiver, and where no real estate came into his possession, is not entitled to a preference. *Atty. Gen. v. Guardian Mutual Life Ins. Co.*, 5 Supp. 84, citing *Atty. Gen. v. At. Mut. Ins. Co.*, 100 N. Y. 279.

One who takes an assignment, after dissolution of a corporation, of a claim upon which its contingent liability became fixed before that event, has the same rights as his assignor, and is a creditor of the corporation. *Moosbrugger v. Walsh*, 89 Hun, 564, 35 Supp. 550, 70 St. Rep. 117. Where the property of the debtor is taken possession of by the court to be administered for the benefit of all the creditors, the statute does not run against any debts not then barred. *Ludington v. Thompson*, 4 App. Div. 117, 38 Supp. 768, 74 St. Rep. 110.

When a corporation has been legally organized, its existence may continue after an event which would be sufficient cause for its dissolution by the court, and when dissolved for violation of laws under which it existed, the rights of the creditors, who have become such since the time when it has forfeited its rights, cannot be ignored, and such of its assets as have been seized by the court must, in the absence of statutory provisions, be distributed among creditors according to the principles of equity. *Matter of the Application of the Commissioners of the State Reservation*, 122 N. Y. 177.

A judgment recovered in another State, against a corporation organized under the laws of this State after such corporation has been dissolved in an action to which the receiver was not a party, is not enforceable in our courts against the receiver, although it is valid under the laws of the State in which it was recovered. *Rodgers v. Adriatic Fire Insurance Co.*, 148 N. Y. 34, affirming 87 Hun, 384, 34 Supp. 323, 68 St. Rep. 474. Where the by-laws of a foreign benevolent society provided that each branch should retain a certain percentage of assessments to form a reserve fund to be the property and subject to the control of the supreme body, the reserve fund of each local branch, upon the society becoming insolvent where there are no creditors in this State except members, should be repaid to the members thereof in proportion

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to their payments contributed to the fund. *Lindquist v. Glines*, 3 Misc. 214, 23 Supp. 272. Where there are sufficient assets in the hands of receivers of a corporation, the claim of a creditor must be paid although the time to prove debts against the estate has expired. *Pco. v. Remington & Sons*, 59 Hun, 282, 36 St. Rep. 282, 12 Supp. 824, affirmed on opinion below, 126 N. Y. 654. Where a creditor proves certain claims against an insolvent corporation, it cannot also prove coupon notes which it had agreed should be held as security for any indebtedness of the corporation against the other parties to such notes. The creditor of an insolvent corporation has the right to prove and have dividends of his entire debt irrespective of the collateral security held by him. *Pco. v. Remington & Sons*, 54 Hun, 480, 28 St. Rep. 427, 8 Supp. 31, affirmed, 121 N. Y. 328, 25 Abb. N. C. 78, 31 St. Rep. 289. The court has no power to allow a receiver compensation in addition to the 5 per cent. allowed by the statute. *Matter of Orient Mutual Ins. Co.*, 50 St. Rep. 460, 21 Supp. 237. The necessary expenses of administration, including the fees of the receiver, constitutes a first lien on the funds in his hands even on property attached prior to his having been appointed receiver, where the attaching creditors have been made parties to a proceeding in which an order is made to turn over the attached property to the receiver. *Matter of Atlas Iron Construction Co.*, 19 App. Div. 415, 46 Supp. 467. A receiver who is warranted in bringing an action to set aside a chattel mortgage and in appealing from the judgment, though unsuccessful, is entitled to be allowed the expenses and costs incurred by him. *Matter of Merry*, 11 App. Div. 597, 42 Supp. 617, 76 St. Rep. 617. A receiver is entitled to have his commissions calculated and allowed upon the final settlement and disposition of his account. *Matter of Security Life Insurance Co.*, 31 Hun, 36. In determining the amount of the receiver's commissions the court will take into consideration the manner in which he has managed the trust fund. *Matter of Common Wealth Fire Insurance Co.*, 32 Hun, 78. Commissions will not be allowed a receiver upon money merely turned over to him by his predecessor in office. *Attorney-General v. Continental Life Insurance Co.*, 32 Hun, 223. In computing the commissions of a receiver of a corporation upon his resignation, only the amount which has actually come into his hands should be considered. *People v. Mutual Benefit Associates*, 39 Hun, 49. Although

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receivers selling property subject to incumbrance upon it are not entitled to commissions upon the amount of the incumbrances, yet this rule does not apply to a case where the receiver pays off the incumbrances and sells the property free and clear from it. *Matter of Security Life Insurance Co.*, 31 Hun, 36. Neglect, inattention, and misconduct resulting in probable loss are a ground for refusing to award commissions to a receiver. *Clapp v. Clapp*, 49 Hun, 195, 17 St. Rep. 39, 125 N. Y. 693. Upon a receiver's accounting he cannot be allowed commissions and also a sum for his services. *Hynes v. McDermott*, 3 St. Rep. 582, 14 Daley, 104. Where a firm held a mortgage upon a vessel, which mortgage was foreclosed by the receiver of the firm and the vessel bought in, it was held that the receiver was entitled to his commissions on the money in his hands which he employed in the purchase. *Brett v. Brett*, 4 St. Rep. 704. Where a receiver had paid money under an order which was reversed, it was held to be error to require payment of the commission and expenses of the receiver. *Willis v. Sharp*, 124 N. Y. 406, 36 St. Rep. 417, modifying 35 St. Rep. 329, 12 Supp. 120. Upon the settlement of the receiver's accounts there is no authority for granting an extra allowance, where the action has not been determined and there has been no award of costs. *Hanover Insurance Co. v. Germania Insurance Co.*, 46 Hun, 308, 11 St. Rep. 481. Where an account was presented containing a bill for attorney and counsel fees, and including a large number of items, a reference was ordered to determine whether the charges were proper. *Attorney-General v. Continental Insurance Co.*, 31 Hun, 623. A receiver of a corporation will be directed to pay costs awarded against him in an action originally brought against the corporation, where such costs were incurred for the benefit of the fund, and all preferred claims have been paid. *Lock v. Covert*, 42 Hun, 484, 12 Civ. Pro. 31.

A receiver should not employ as his attorney the same person who acted as attorney of the person over whose property the receiver was appointed; such a receiver is not entitled to commissions, nor to be allowed for counsel fees paid to such attorney. *Clapp v. Clapp*, 10 St. Rep. 733, 49 Hun 195, 125 N. Y. 693.

That the receiver should not employ the counsel of either party to the litigation where he is acting adversely to one of them, is held in *Hynes v. McDermott*, 3 St. Rep. 592, 14 Daly, 104, while the rule is laid down generally that a receiver must not employ

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the counsel of either party. *Ex parte Ainsley*, 1 Edw. Ch. 576; *Ray v. MacComb*, 2 Edw. Ch. 165. But it is said that the receiver may employ counsel of either of the parties by consent. *Warren v. Sprague*, 11 Paige Ch. 200, 4 Edw. Ch. 416. See on this point *Bennett v. Chapin*, 3 Sandf. 673; *Smith v. N. Y. Consolidated Stage Co.*, 28 How. 377, 18 Abb. Pr. 419.

No precedents are given for the settlement of accounts of receivers, since that matter is fully considered in Special Actions, where forms are given pages 1161 to 1187, and the same proceedings substantially are taken on voluntary dissolution as in an action, so far as relates to receivers.

ARTICLE VI.

MISCELLANEOUS PROVISIONS AND EXCEPTIONS. §§ 2430, 2431.

§ 2430. Certain sales, etc., void.

A sale, assignment, mortgage, conveyance, or other transfer, of any property of a corporation, made after the filing of a petition as prescribed in this title, in payment of, or as security for, an existing or prior debt, or for any other consideration; or a judgment thereafter rendered against the corporation by confession, or upon the acceptance of an offer, is absolutely void, as against the receiver appointed in the special proceeding, and as against the creditors of the corporation.

R. S. § 70.

2431. [Am'd, 1884.] Certain corporations excepted from this title.

This title does not apply to an incorporated library society, to religious corporation, or to a select school or academy, incorporated by the regents of the university or by the legislature, or to a municipal or other political corporation. In case of corporations affected by the provisions of this title, and not having stockholders, it shall be sufficient for the purposes of this title to notify name and refer to the "members" of such corporations instead of "stockholders" as herein provided.

Id. § 91; L. 1884, ch. 406.

Section 2430 is similar to § 71 in statute cited under last section, and it was held in *Sands, Receiver, v. Hill*, 55 N. Y. 18, that the word "transfer," in that statute, means a passing over to another of an existing right to the thing transferred, which right shall survive the transfer. It does not include, and the inhibition of the statute does not apply, to the extinguishment or satisfaction of a chose in action, either by payment in full or by part payment which is taken in full satisfaction. It seems it was not the object of the section to debar the corporation from collecting debts due

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it, but it was intended to prohibit transactions designed to favor one or more creditors, or to give them a preference over others. The rule that insolvent corporations cannot, directly or indirectly, prefer their creditors, is reiterated in *Smith v. Danzig*, 64 How. 320; and *Harris v. Thompson*, 15 Barb. 62, and *Sibell v. Remsen*, 33 N. Y. 95, are cited in support of the proposition.

CHAPTER XXIV.

PROCEEDINGS SUPPLEMENTARY TO AN EXECUTION AGAINST PROPERTY.

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ARTICLE I.

REMEDIES UNDER THIS TITLE, AND WHEN GRANTED.

Part of §§ 2433, 2432, 2458, 2461.

§ 2433. Nature of the remedies.

Each of these remedies is a special proceeding. * * * *

§ 2432. [Am'd, 1896.] The different remedies under this title.

This title provides for three distinct remedies, as follows:

1. An order made or a warrant issued against a judgment debtor, after return of an execution.
2. An order made, or a warrant issued against a judgment debtor, after the issuing and before the return of an execution.

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3. An order, made after the issuing, and either before or after the return, of an execution, against the person who has property of the judgment debtor, or is indebted to him.

The proceedings under subdivision third of this section may be pursued either alone or simultaneously with the proceedings under subdivision first or subdivision second. The party to whom costs are awarded in a special proceeding shall be entitled to the same remedies under this title, under the same circumstances, as near as may be, as a judgment creditor. And for the purposes of this title, the party to whom such costs are awarded shall be deemed a judgment creditor, and the party against whom they are awarded shall be deemed a judgment debtor.

§ 2458. [Am'd, 1881, 1897.] Upon what judgment and to what county the execution must have issued.

In order to entitle a judgment creditor to maintain either of the special proceedings authorized by this article, the judgment must have been rendered upon the judgment debtor's appearance or personal service of the summons upon him, for a sum not less than twenty-five dollars or substituted service of the summons upon him in accordance with section four hundred and thirty-six of the Code of Civil Procedure; and the execution must have been issued out of a court of record; and either:

1. To the sheriff of the county where the judgment debtor has, at the time of the commencement of the special proceedings, a place for the regular transaction of business in person; or,

2. If the judgment debtor is then a resident of the State, to the sheriff of the county where he resides; or,

3. If he is not then a resident of the State, to the sheriff of the county where the judgment roll is filed, unless the execution was issued out of a court other than that in which the judgment was rendered, and, in that case, to the sheriff of the county where the transcript of the judgment is filed.

§ 2461. Proceedings where judgment is against joint debtors.

Where the execution was issued as prescribed in § 1941 of this act, a debt due to, or other personal property owned by, one or more of the defendants not summoned, jointly with the defendants summoned, or with any of them, may be reached by a special proceeding, instituted as prescribed in this article, and founded upon the judgment.

The language of § 2433 settles a question long mooted in the courts under the former Code, as to whether the remedy is an action or a special proceeding, and renders obsolete the decisions in a large number of cases. As to the view taken of the former statute by the Court of Appeals, see *Wright v. Nostrand*, 94 N. Y. 31. Since the Code has changed these proceedings, from proceedings in an action to special proceedings, the debtor cannot be made to execute an assignment of lands out of the State in proceedings before a county judge.

Supplementary proceedings are not part of the original action, and the order should not be entitled in the action. *Milliken v. Thompson*, 12 Civ. Pro. 168; compare *Lynch v. Riley*, 22 Wkly. Dig. 357, where it was held, that if the title were defective it

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would not impair the force of the affidavit if it intelligently refers to the proceeding.

It is said by the codifiers that the chapter of the Code of Civil Procedure relating to this matter, in consequence of the numerous amendments interjected after its enactment, is singularly involved and confused, which they apparently deem quite exceptional, and that in order to remove the obscurities of expression and supply its deficiencies, it has been entirely rewritten. If its condition was worse than at present it must have been truly lamentable, as it is one of the most troublesome articles in the Code, largely owing to the lack of care on the part of the revisers. It will be found that but few changes of substance have been made, but some new provisions have been added, a few omitted, and many rearranged. The proceedings under the Tax Law, chap. 908, Laws 1896, may be taken by the supervisor of the town or ward or county treasurer, or by the president of a village, as to a village tax, within one year after return of the tax, before the county judge or special county judge of the county. The act, by its terms, applies to all villages, whether incorporated by special act or under the general acts. This section of the Code is in accordance with the decision in *Gibson v. Haggerty*, 37 N. Y. 555, holding the several proceedings to be independent and superseding a long line of conflicting decisions. The same rule was held in *National Bank of Rome v. Dering*, 8 Week. Dig. 261.

A creditor's bill for discovery still exists and is not superseded by supplementary proceedings. *Hart v. Albright*, 18 Supp. 718, 28 Abb. N. C. 74. Supplementary proceedings issued under §§ 2441, 2446, and 2447 of this title give upon the service of the order the judgment creditor the priority of a vigilant creditor and a lien upon the equitable assets of the debtor. *Duffy v. Dawson*, 2 Misc. 401, 50 St. Rep. 584, 21 Supp. 978. Section 2458 is in accordance with *Bartlett v. McNeil*, 60 N. Y. 53, to the effect that the debtor must have been personally served or appeared in the action, or the proceedings cannot be had. Supplementary proceedings may be taken on a judgment for costs as the Code now stands. *Davis v. Herrig*, 65 How. 290. To authorize the examination of a non-resident of the county it must appear that defendant has a place in the city for the transaction of business in person as distinguished from transactions through his agents. *Brown v. Gump*, 59 How. 507. Where a transcript of a

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justice's judgment is filed in Kings County, and a transcript in New York, it was held execution was properly issued to the sheriff of the latter county, returnable to the clerk of Kings, and that supplemental proceedings could be had in the common pleas. *Strybing v. Hicks*, 2 Law Bull. 6. Under the old Code it was held supplemental proceedings could not be instituted where a transcript of a justice's judgment for less than \$25, exclusive of costs, has been filed, and an execution thereon has been returned unsatisfied. *Wolf v. Jordan*, 22 Hun, 108.

As a party by executing a recognizance agrees to the entry of judgment in case of forfeiture, it is equivalent to an appearance in an action within the meaning of § 2458, and therefore supplementary proceedings may be based upon an execution issued upon a judgment entered on the forfeiture of a recognizance, although process was not served, and the defendant did not appear. *People v. Cowan*, 146 N. Y. 348, 69 St. Rep. 185, reversing 6 St. Rep. 11, 31 Supp. 427. As § 3017 of the Code requires that an execution upon a justice's judgment which has been docketed in the county court must be issued by the county clerk, it follows that where the execution upon such justice's judgment was docketed and issued out of the county court, such execution is a nullity, and proceedings for the examination of the judgment debtor founded thereon are fatally defective. *Merritt v. Judd*, 18 Civ. Pro. 160, 9 Supp. 491 ; but see *Barither v. Brosche*, 19 Civ. Pro. 446. An execution required as the basis of supplementary proceedings is the execution stated in § 2458, and a compliance with the provisions of § 1252, Code Civil Procedure, will not authorize the institution of supplementary proceedings, unless the requirements of § 2458 exist. *Importers and Traders' Bank v. Quackenbush*, 144 N. Y. 651, 71 St. Rep. 280.

An execution issued to the county where the debtor resides during summer, although the same is not his permanent residence, and which is returned unsatisfied, is sufficient to sustain an order for his examination, while he resides in such county. *Matter of Rowland*, 21 App. Div. 172, 47 Supp. 493. Where an execution was issued by a county clerk upon the judgment of a justice's court at the request of executors, it does not prejudice supplementary proceedings subsequently taken thereon, that the execution was not indorsed as having been issued by executors. *Devo v. Borley*, 43 St. Rep. 638, 18 Supp. 300. The fact that an

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execution upon a district court judgment, of which a transcript was docketed in the county clerk's office, was issued by the plaintiff's attorney, and was not issued or indorsed by the county clerk, is not an irregularity which deprives the court of jurisdiction in supplementary proceedings. *Bariether v. Brosche*, 19 Civ. Pro. 446, 13 Supp. 561; but see *Merrit v. Judd*, 18 Civ. Pro. 160, *supra*. An allegation in the affidavit on an application for an order in supplementary proceedings which states that the execution was "delivered to the sheriff of Chemung County where the said judgment debtor resided and yet resides, *or* has at the time of the commencement of these proceedings, an office for the regular transaction of business in person," is insufficient to justify the granting of an order, because the affidavit is in the alternative, and therefore alleges neither one fact nor the other. *Arnot v. Wright*, 55 Hun, 561, 29 St. Rep. 425, 9 Supp. 15.

As a judgment ceases to be a lien upon a debtor's real estate ten years after the return of the execution, a second execution cannot reach all the debtor's property, and therefore an order for examination and the appointment of receiver thereon may be set aside unless the defects are waived. The debtor's appearance in obedience to the order, and submission to the examination without objection, is a waiver of such defects. *Glover v. Gargan*, 10 App. Div. 527, 42 Supp. 74. An execution returned less than 60 days may be the basis of an order in supplementary proceedings, until such return is set aside. *Highrock Knitting Co. v. Bronner*, 18 Misc. 631, 43 Supp. 684.

ARTICLE II.

JURISDICTION. §§ 2434, 2459, 2462.

§ 2434. [Am'd, 1895, 1891.] What judge may entertain the proceedings.

Either special proceedings may be instituted before a judge of the court, out of which, or the county judge, the special county judge, or the special surrogate, of the county to which the execution was issued; or where it was issued to the city and county of New York, from a court other than the city court of that city, before a justice of the Supreme Court for that city and county. Where the execution was issued out of a court other than the Supreme Court, and it is shown by affidavit, that each of the judges, before whom the special proceedings might be instituted, as prescribed by this section, is absent from the county, or, for any reason, unable or disqualified to act, the special proceedings may be instituted before a justice of the

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Supreme Court. In that case, if he does not reside within the judicial district embracing the county to which the execution was issued, the order made or warrants issued by him must be returnable to a justice of the Supreme Court, residing in that district, or the county judge, or the special judge, or special surrogate, of that or an adjoining county, as directed in the order or warrant. Where the judgment upon which the execution was issued was recovered in a district court of the city of New York, either special proceedings shall be instituted before a justice of the city court of the city of New York.

§ 2459. In what county judgment debtor, his bailee, etc., must attend.

If the judgment debtor, or other person, required to attend and be examined, as prescribed in this article, or the officer of a corporation, required to attend in its behalf, is, at the time of the service of the order upon him, a resident of the State, or then has an office within the State, for the regular transaction of business, in person, he cannot be compelled to attend, pursuant to the order, or to any adjournment, at a place without the county wherein his residence or place of business is situated.

§ 2462. Proceedings commenced before one judge may be continued before another.

Sections 26, 52, and 279 of this act apply to a special proceeding, instituted as prescribed in this article; and the judge before whom it is continued, as prescribed in either of those sections, is deemed to be the judge to whom an order or warrant is returnable, for the purpose of any provision of this or the next article.

The proceedings are before a judge and not in court. *Webber v. Hobbie*, 13 How. 382; *Miller v. Bowman*, 15 id. 10; *Butting v. Vanderburgh*, 17 id. 80. The order may be made at chambers, and entitling the order at Special Term does not make it void. *Hulsaver v. Wiles*, 11 How. 446; *Dresser v. Van Pelt*, 15 id. 19. A general stay should not be granted by a judge other than the one before whom the proceeding is pending. *Bank of Genesee v. Spencer*, 15 How. 14. It was held at an early date, under the old Code, that the proceedings might be entitled in the action. *Davis v. Turner*, 4 How. 190. And that practice has been followed almost without question or criticism under the present Code, despite the fact that it has now become settled that it is a special proceeding. It is, however, held in *Milliken v. Thompson*, 8 State Rep. 106, that proceedings supplementary to execution are not a part of an action, and the order should not be entitled in the action. It is said in *Bingham v. Disbrow*, 37 Barb. 24, that any justice of the Supreme Court may make an order on the judgment of that court, without regard to his residence or location. But in *Browning v. Hayes*, 41 Hun, 382, it is held that a non-resident debtor cannot be taken out of the county where his place of business is located. When an order is made by a justice of the Supreme Court to examine a judgment debtor

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in another judicial district, the order must be made returnable before a judge in that district, and the words, "in that case," in § 2434, do not alone refer to orders made for inferior judges, but are intended to embrace all orders to be made "before a justice of the Supreme Court."

The order is within the jurisdiction of the judge of the county to which execution has been issued. *Miller v. Adams*, 7 Lans. 131, affirmed, 52 N. Y. 409. And a county judge cannot make an order to examine a third party on a judgment of the Supreme Court unless execution has been issued to the county of such judge. *Terry v. Hultz*, 39 How. 169. Although a transcript has been filed, it was held that the Marine Court had jurisdiction to take supplementary proceedings. *Hosbrook v. Orgler*, 49 How. 289. A justice of the Supreme Court has power to entertain proceedings on a judgment of that court. *Baldwin v. Perry*, 25 Hun, 72, reversing 1 Civ. Pro. 32. All the proceedings on a judgment of the Supreme Court may be had before a justice of that court anywhere in the State, except the attendance and examination of the party proceeded against. *Crouse v. Wheeler*, 33 How. 337; *Bingham v. Disbrow*, 37 Barb. 24. The order may require the party proceeded against to appear at a time and place specified before the justice who makes the order, "or some other justice of this court at chambers." *Bank for Savings v. Hope*, 8 Daly, 316. The warrant to arrest the debtor may be made by a judge at chambers residing in the same judicial district, although not in the same county as the debtor, but it is said that this power should not be exercised in a case where the judgment debtor resides in a distant county, unless to prevent a failure of justice. The referee appointed may reside in a different county from that of the debtor. *Wilson v. Andrews*, 9 How. 39. Where the order is to appear before a referee, and he is absent, an order to appear before another referee, obtained from another judge, is irregular. The judge who granted the first order could have named another referee or changed the time of hearing. *Allen v. Starring*, 26 How. 57. Upon an order made in county court to vacate an order, in supplementary proceedings, made by the county judge, requiring the judgment debtor to appear before a referee, the court has not power, upon denying the motion, the return day of the original order having passed, to direct the debtor to ap-

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pear before the referee at a subsequent day and to be examined, as jurisdiction to make the order for the examination is vested in the judge and not in the court. *Douglass v. Mainzer*, 40 Hun, 75. But on the other hand in apparent conflict with this holding, see Special Term decision in *Joyce v. Spafard*, 9 Civ. Pro. 342. Where a transcript of a judgment of a justice in Brooklyn was filed in the office of the county clerk of Kings and a transcript filed in the office of the clerk of New York County, *held*, that an execution was properly issued to the sheriff of New York and made returnable to the clerk of Kings, and supplementary proceedings were properly taken in the common pleas. *Strybing v. Hicks*, 2 Law Bull. 6. See, also, as to the jurisdiction of common pleas on judgment of district court, *Hanrie v. Vecgtlin*, 5 Law Bull. 38. The provisions of this section are the subject of judicial construction in *Baldwin v. Perry*, 25 Hun, 71. And it is there said that the system of this section is plain: that it confers power to institute supplementary proceedings. *First*. Before any judge of the court out of which the execution issued. *Second*. Before any county judge or special county judge of any county to which execution was issued. *Third*. Before any judge of the Court of Common Pleas in and for the city of New York, where the execution was issued to that county, out of any court other than the Marine Court. *Fourth*. To provide for cases where the execution is issued out of a court other than the Superior Court, and each of the judges before whom the special proceedings might be instituted as previously prescribed in the section, is absent from the county, or for any reason unable or disqualified to act, by authorizing the proceedings in such cases to be instituted before a justice of the Supreme Court, and directing where the subsequent steps in the proceeding shall be taken, in cases in which the party proceeded against does not reside in the judicial district embracing the county to which execution was issued. The court adds that all these provisions are harmonious and consistent with each other, and offer no occasion for reasonable doubt.

A justice of the Supreme Court granting an order after the examination of a judgment debtor, should not make all subsequent proceedings returnable before another justice in a different judicial district, nor is there any provision which authorizes proceedings to punish for contempt or any other purpose to be con

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tinued before an officer other than the one before whom it was instituted. *Blanchard v. Reilly*, 11 Civ. Pro. 278. A judge of the Supreme Court of Brooklyn may make an order based on the judgment of that court after a return of execution unsatisfied directing a third person to appear for examination in another county of the State as to the property of the judgment debtor. *Graves v. Scoville*, 12 Civ. Pro. 165. If the judgment upon which supplementary proceedings are taken was a judgment of the Supreme Court, the order is properly entitled in the Supreme Court, although made by a county judge. *Ackerle & Gerard Co. v. Partz*, 39 St. Rep. 17, 14 Supp. 466, 22 Civ. Pro. 382.

The part of the section which requires that the order when granted by a justice of the Supreme Court, in a district other than the debtor's residence, shall be returned before a justice of the district embracing the county in which the execution was issued, applies to proceedings where the execution was issued from the Supreme Court, as well as executions from other courts. *Peck v. Baldwin*, 58 Hun, 308, 34 St. Rep. 511, 11 Supp. 792, 19 Civ. Pro. 403, affirmed, 131 N. Y. 567. The recorder of the city of Albany can act in supplementary proceedings only within the limits of the city. *Carroll v. Langan*, 63 Hun, 380, 44 St. Rep. 224, 18 Supp. 290.

The residence is determined by the place where the debtor resided when execution against the property has issued. *Bingham v. Disbrow*, 37 Barb. 24; *McEwan v. Burgess*, 25 How. 92; *Jesup v. Jones*, 32 id. 191. It is not necessary that supplementary proceedings should be conducted in the judicial district in which the action was tried and judgment entered. They may be instituted before a justice of the Supreme Court in another district. *Jacobson v. Doty, etc., Co.*, 32 Hun, 436. A weigher in the New York Custom House has not, as such, a place of business in the city of New York. *Belknap v. Hasbrouck*, 13 Abb. 418, n. The place of business need not be the principal place of business of the debtor. *McEwan v. Burgess*, 25 How. 92. Where the execution was issued to Queens, where the judgment debtor resided, and returned unsatisfied, it was held that a justice of the Supreme Court in the city of New York had jurisdiction to make an order compelling a debtor to the judgment debtor, residing in the city of New York, after examination, to apply the property of the judgment debtor in his hands, or

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make payment to the judgment creditor upon his judgment. *Foster v. Prince*, 18 How. 258. Where execution was issued on a judgment in the New York Superior Court to a county other than New York, where the debtor resided at the time of its issue, and after its return unsatisfied the debtor removed to New York, it was held he could be examined there. *Gould v. Moore*, 51 How. 188. A judgment debtor can be examined without the county of his residence only where he has a regular place of business and transacts it in person, not merely by agent. *Brown v. Gump*, 59 How. 507. Where the debtor does not reside in the State, and has no place of residence here, the proceedings must be conducted where the judgment roll was filed. When he has a place of business in this State he may be examined in the county where such business is carried on if a transcript has been filed there and an execution issued, though the judgment roll was filed in another county. *Anway v. David*, 9 Hun, 296.

ARTICLE III.

ORDER TO EXAMINE DEBTOR AFTER RETURN OF EXECUTION.

§ 2435.

SUB. 1. WHO ENTITLED TO THE REMEDY AND AGAINST WHOM. § 2435.

2. RETURN OF THE EXECUTION.

3. THE AFFIDAVIT.

4. THE ORDER AND PROCEEDINGS THEREON.

SUB. 1. WHO ENTITLED TO THE REMEDY AND AGAINST WHOM. § 2435.

§ 2435. [Am'd, 1896.] Order to examine debtor after return of execution.

At any time within ten years after the return, wholly or partly unsatisfied, of an execution against property, issued upon a judgment, as prescribed in § 2458 of this act, or, in case of an order, issued in the same manner so far as the provisions of said section can be applied in substance, the creditor under such judgment or order, upon proof of the facts, by affidavit or other competent written evidence, is entitled to an order, requiring the debtor under the judgment or order, to attend and be examined concerning his property, at a time and place specified in the order.

As to what judgments give the right to the remedy, see § 2458 and cases cited. The assignee of a judgment may take these proceedings, and this is true even though he take the assignment after return of execution. *Ross v. Clussman*, 3 Sandf. 676; *Fredcrick v. Decker*, 18 How. 96; *Orr's Case*, 2 Abb. 457; *King v. Kirby*, 28 Barb. 49; *Crill v. Kornmeyer*, 56 How. 276. The personal representatives of a deceased party may take the proceed-

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ings at any time within five years after the entry of judgment. *Collier v. DeRevere*, 7 Hun, 61; *Scott v. Durfee*, 59 Barb. 390, n. See § 1376 on this point. The judgment presumptively belongs to the executor of plaintiff, *Collier v. DeRevere*, *supra*, and the representative of a deceased creditor, in whose lifetime an execution was returned unsatisfied, may, on showing that fact and letters of administration, have an order. *Walker v. Donovan*, 53 How. 3. The representatives of a party whose right under the judgment and execution had been determined prior to September, 1880, when the repeal of § 183 of the old Code took effect, may institute proceedings without reviving the action. *Pardee v. Tilton*, 20 Hun, 76. An attorney who has a lien on a judgment for costs and interest may resort to supplementary proceedings, but the affidavit should show the fact of the lien. *Russell v. Somerville*, 4 Law Bull. 3. After the death of plaintiff the attorney who obtained the judgment has no authority to institute proceedings, they must be taken in the name of the personal representatives, otherwise they are void. *Amore v. La-Mothe*, 5 Abb. N. C. 146.

A receiver of a corporation may institute proceedings in the name of the corporation after it has ceased to exist, and procure the appointment of a receiver of the judgment debtor's property. *Wright v. Nostrand*, 94 N. Y. 31. An attorney, employed to collect a claim, has power, by virtue of his original retainer, after he obtains judgment, to institute supplementary proceedings thereon, and to procure the appointment of a receiver. *Ward v. Roy*, 69 N. Y. 96. The ground on which this ruling is placed is that it is a proceeding in the suit. As it is now a special proceeding, possibly a different rule might be laid down. In *Moore v. Taylor*, 40 Hun, 56, without referring to the case just cited, and on the authority of *Lusk v. Hastings*, 1 Hilt. 653, and *Egan v. Rooney*, 38 How. 121, it is said that the authority of the attorneys for plaintiff ceased on the entry of judgment, and after that plaintiff could employ another attorney without substitution, and the fact of a lien on the judgment does not entitle the attorneys to carry on the proceedings. A judgment creditor is not permitted to harass his debtor by successive examinations after he has once fully examined him; a second order will not be granted unless some good reason be given therefor, even though the second application be founded upon another judgment, held

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by the same creditor against the same debtor. *Canavan v. McAndrew*, 20 Hun, 46.

The proceedings are authorized where the execution is against an infant judgment debtor. The regularity of the judgment cannot be inquired into collaterally. *Lederer v. Ehrenfeld*, 49 How. 403. But the proceeding cannot be taken against a foreign minister or consul. They are under the exclusive jurisdiction of the Federal courts. *Griffin v. Dominguez*, 2 Duer, 656. Nor against a corporation. *Hinds v. C. & R. R. Co.*, 10 How. 487; *Hammond v. H. R. Iron Co.*, 11 id. 29; *Sherwood v. Buffalo & N. Y. R. R. Co.*, 12 id. 136, and § 2463, Code of Civil Procedure. Nor against a trustee personally upon a judgment against him in his representative capacity. *In re Jung*, 16 Week. Dig. 563. At least not until it appears there is no fund that can be reached. *Felt v. Dorr*, 29 Hun, 14. Nor can a person maintain the proceedings against himself in a representative capacity. The proceedings are necessarily collusive and void. *Matter of Livingston*, 27 Hun, 607. And the proceedings cannot be maintained against a judgment debtor under arrest on an execution on the same judgment, since the taking of the body is, for the time being, a satisfaction of the judgment. *McGuinty v. Herrick*, 5 Wend. 240; *Chapman v. Hatt*, 11 id. 41; *Coopers v. Bigelow*, 1 Cow. 56.

In connection with this subdivision, see Decrees under § 2458, *supra*.

Proceedings cannot be maintained in the county court on a judgment of a justice's court, where the transcript was not filed with the county clerk until more than six years after the recovery of the judgment, as the same had thus become barred by the statute of limitations. *Davidson v. Horn*, 47 Hun, 51. Proceedings may be based upon an order which directs a purchaser at a judicial sale to pay an ascertained amount upon the refusal of such purchaser to complete his purchase, and a receiver may be appointed therein and may maintain an action to set aside a fraudulent conveyance of the debtor. *Lydecker v. Smith*, 44 Hun, 454.

SUB. 2. RETURN OF THE EXECUTION.

The execution must be actually returned before proceedings can be taken under the first subdivision, and the remedy on the execution should be really exhausted. *Engle v. Bonneau*, 2

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Sandf. 679; *Livingston v. Cleveland*, 5 How. 396; *Sackett v. Newton*, 10 id. 560; *Fenton v. Flagg*, 24 id. 499; *Tyler v. Whitney*, 33 Barb. 327. But the sheriff need not keep the execution sixty days; he may return it at any time within that period, and proceedings may be taken thereon at once. The sheriff is presumed to have done his duty in searching for property. *Field v. Chapman*, 15 Abb. 434; *Hart v. Stearns*, 4 Week. Dig. 540; *First Nat. Bank of Rome v. Dering*, 8 id. 261. This is the rule even though the sheriff was notified the debtor had property. *Stoors v. Kelsey*, 2 Paige, 418. And it is immaterial whether the return was at the request of the creditor, or not, unless the sheriff has by collusion made a return without any *bona fide* attempt to find goods subject to levy. *Forbes v. Waller*, 25 N. Y. 430. Although several of the Supreme Court decisions have held the contrary doctrine, they must be regarded as overruled by this case. The return of the sheriff cannot be impeached collaterally, only by motion to set it aside. *Sperling v. Levy*, 10 Abb. 426; *Tyler v. Whitney*, 33 Barb. 327; *Owen v. Dupignac*, 9 Abb. 180; see, also, opinion of Judge Smith in *Forbes v. Waller*, *supra*, and *Wright v. Nostrand*, 94 N. Y. 31.

Where the judgment creditor procured an order about two hours before the return was actually filed, having reason to suppose the return was actually filed, the fraction of a day was disregarded and the order held valid. *Jones v. Porter*, 6 How. 286. See *Blydenburgh v. Cothcal*, 5 id. 200, holding the same rule as to filing of judgment roll and appeal therefrom. So the creditor was held entitled to an order where an execution was returned and a judgment roll was afterward amended by reason of the reduction of the judgment without issuing another execution. *Sluyter v. Smith*, N. Y. Super, 1858, cited Bliss' Annotated Code, vol. 2, p. 555. In *Marx v. Spaulding*, 35 Hun, 478; s. c., 16 Abb. N. C. 309, the sheriff returned: "In pursuance of the demand of the plaintiff's attorneys I make the following return to the within execution; I have collected nothing under, and have not found any personal property out of which the said execution, or any part of the same, can be made; but I have thereunder levied on the real estate mentioned in the annexed notice of sale, and have advertised the same for sale, as in said notice provided; I have found no other property out of which to satisfy the same." This return was held insufficient to authorize the proceedings

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after return of execution. This case is said (Abbott's Annual, 1886) to have been affirmed by the Court of Appeals. However, in *Forbes v. Spaulding*, 52 N. Y. Super. 166; s. c. 8 Civ. Pro. 135, upon the same return, it was held that the execution was returned unsatisfied within the meaning of this section, and that plaintiff was entitled to an order for the examination of the defendant. Where process was only served on one partner and judgment and execution had against all, a return, *nulla bona*, held to exhaust the remedy. *Perkins v. Kendall*, 3 Civ. Pro. 240. Where it appeared more than sixty days had expired since issuing execution and the judgment remained unsatisfied, it was presumed the sheriff had done his duty and to have returned the execution. *Bean v. Tonnelle*, 1 Civ. Pro. 33.

Proceedings supplementary may be taken immediately after due return of execution unsatisfied. *Engle v. Bonneau*, 2 Sandf. 679; *Livingston v. Clearclevland*, 5 How. 396; *Forbes v. Waller*, 25 N. Y. 430. The limitation in the section to ten years renders obsolete *Owen v. Dupignac*, 9 Abb. 180; *Belknap v. Hasbrouck*, 13 id. 418; *Driggs v. Williams*, 15 id. 477. The latter case may, however, be regarded as authority for the proposition that if proceedings are legally instituted on a judgment before the lapse of twenty years from its recovery, they do not abate upon the expiration of twenty years. Proceedings may be instituted within ten years after return of execution against property, though more than ten years have elapsed since the return of a former execution. *Levy v. Kirby*, 51 N. Y. Super. 69.

Supplementary proceedings must be brought within ten years from the first execution upon the judgment, and the time cannot be extended by showing a second execution. *Baumler v. Ackerman*, 63 Hun, 40, 43 St. Rep. 87, 17 Supp. 436. An examination of a judgment debtor cannot be denied merely because he shows that he has real property subject to levy. *Eleventh Ward Bank v. Heather*, 22 Misc. 87, 48 Supp. 449, reversing 21 Misc. 539, 47 Supp. 718, 81 St. Rep. 718.

Subdivision 7 of § 382, Code Civil Procedure, which provides that an action upon a judgment in a court not of record must be brought within ten years, does not apply to supplementary proceedings issued upon an execution of a justice's court. Such proceedings may be brought on such judgment any time within ten years after its rendition. *Green v. Hauser*, 18 Civ. Pro. 354, 31

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St. Rep. 17, 9 Supp. 660; see, also, *Bolt v. Hauser*, 57 Hun, 567, 33 St. Rep. 343, 10 Supp. 397, 19 Civ. Pro. 7, 210. The objection that the right to bring proceedings is barred by limitation must be taken before the appointment of a receiver. *Bolt v. Hauser*, 19 Civ. Pro. 7, 10 Supp. 397. The requirement that the proceedings must be instituted within ten years from the return of the execution unsatisfied applies, although the right accrued before the Code Civil Procedure was enacted. *Conyngham v. Duffey*, 125 N. Y. 200, 34 St. Rep. 736; *McGuire v. Hudson*, 41 St. Rep. 295, 16 Supp. 392; *Cleveland v. Johnson*, 5 Misc. 484, 26 Supp. 734. The right to institute the proceedings is barred ten years after the return of the first execution in the absence of new proceedings to revive it. *Importers & Traders' Bank v. Quackenbush*, 142 N. Y. 567, 63 St. Rep. 624, reversing 80 Hun, 111, 61 St. Rep. 750, 30 Supp. 35. Unless the judgment is a lien upon the debtor's real estate at the time the execution was issued, supplementary proceedings cannot be entertained. *Importers & Traders' Bank v. Quackenbush*, 143 N. Y. 567, 62 St. Rep. 781, reversing 80 Hun, 111, 61 St. Rep. 750, 30 Supp. 35. Even if an execution be the first one issued to the county of the debtor's residence, yet, supplementary proceedings will not lie, if such execution is issued more than ten years after the recovery of the judgment. *Importers & Traders' Bank v. Quackenbush*, 144 N. Y. 651, 71 St. Rep. 280. The ten-year limitation in supplementary proceedings is not stayed by an adjudication in bankruptcy against the judgment debtor. *Cleveland v. Johnson*, 5 Misc. 484, 26 Supp. 734. Where an execution upon a judgment was issued without leave of the court more than five years after the entry of the judgment, supplementary proceedings instituted thereon will be vacated. *Aultman & Taylor Co. v. Syme*, 87 Hun, 295, 68 St. Rep. 311, 34 Supp. 379. In proceedings under § 2435 it is an essential requirement that an execution has been returned wholly or partially unsatisfied; and the objection that such execution was not returned before the granting of the order is not waived by the debtor's appearance and submission to examination, for the defect is a jurisdictional one. *Jennings v. Lancaster*, 15 Misc. 444, 37 Supp. 196, 72 St. Rep. 667. A trustee against whom a judgment has been rendered may be examined in supplementary proceedings. Sup. Ct. 1898. *Matter of Gough*, 31 App. Div. 307, 52 N. Y. Supp. (86 St. Rep.) 627.

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SUB. 3. THE AFFIDAVIT.

The fact that the court is improperly named in the title of the action is not a substantial objection to the order. *Terry v. Bange*, 30 St. Rep. 285, 9 Supp. 311, 18 Civ. Pro. 288. It is said in *Scott v. Durfee*, 59 Barb. 390, and *Collier v. DeRevere*, 7 Hun, 61, that an affidavit is not necessary, but an affidavit is the usual written evidence on which the order is sought. The affidavit may be made by the judgment creditor, his attorney or agent. *Conway v. Hitchins*, 9 Barb. 378. The person making the affidavit must be in some way connected with the matter so as to know the facts, or the order will be set aside. *Frederick v. Decker*, 18 How. 96. The agent should show the nature of his agency. *Hawes v. Burr*, 7 Robt. 452. And if made by an assignee the affidavit should show the fact. *Lindsay v. Sherman*, 5 How. 308. But an affidavit by one who describes himself as attorney, of the plaintiff, without alleging that he is the attorney, is sufficient. *Miller v. Adams*, 52 N. Y. 409. The cases holding that proof was necessary to authorize the granting of order under old Code seem to be in point under this section. *People v. Oliver*, 66 Barb. 570; *Wegman v. Childs*, 44 id. 403; *Greene v. Bullard*, 8 How. 313. The proceedings cannot be maintained on an affidavit which does not correctly describe the judgment. This defect cannot be cured by amendment. *Kennedy v. Weed*, 10 Abb. 62. It must set forth that the judgment has been docketed, and that the transcript was filed before execution issued. *Hawes v. Burr*, 7 Robt. 452; *Simms v. Frier*, 2 Law Bull. 97. This, however, only on execution on judgment of an inferior court. *Bingham v. Disbrow*, 37 Barb. 24; *Kennedy v. Thorp*, 3 Abb. (N. S.) 131. But it need not allege specifically that the judgment is for more than \$25 if the fact appear. *Whitlock's Case*, 1 Abb. 320. Nor that the justice had jurisdiction if it shows the judgment is regular. *Conway v. Hitchins*, 9 Barb. 378, *supra*. Whether it must state the execution was "against property." *McArthur v. Lansburgh*, 1 Code R. (N. S.) 211; *People v. Hulburt*, 5 How. 446. The rule requiring an averment that no previous application has been made for the order was not intended to apply to these proceedings. *Schanck v. Conover*, 56 How. 437; *Sayer v. McDonald*, 2 How. Pr. (N. S.) 119. But the rule is different in the Common Pleas. *Diossey v. West*, 1 Law Bull. 23. As to requisites in an application under chapter 640, Laws of 1881, see *In re Conklin*,

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21 Week. Dig. 329. It need not appear by the affidavit that the judgment debtor has property. *Hatch v. Weyburn*, 8 How. 163. The papers should be entitled in the county court, in proceedings on appeal from justice's judgment. *People v. Oliver*, 66 Barb. 570. Where the trustee of an express trust is chargeable with costs they are payable from the estate, and an affidavit in supplementary proceedings that an execution against his property "as assignee" has been returned unsatisfied is not sufficient, as it does not sufficiently appear that the execution directed the sheriff to satisfy the judgment out of the trust property held by the assignee, as required by § 1371. *Felt v. Dorr*, 29 Hun, 14. As to the rule when execution was returned under the old Code, as to averments conforming to that Code, see *Folkwell v. Cambeis*, 14 Week. Dig. 115. Where an affidavit states the entry of a judgment in the clerk's office, and alleges that an execution was duly issued thereon and delivered to the sheriff, it is sufficiently shown that such execution was issued out of a court of record. *Joyce v. Spafard*, 9 Civ. Pro. 342; appeal dismissed without opinion, 101 N. Y. 657. An affidavit for examination of a judgment debtor sufficiently shows the court in which the judgment was rendered where it is entitled in the Supreme Court, and states that the judgment "was rendered and perfected in this action." *Webster v. Saun*, 3 How. (N. S.) 320. Where the affidavit states the filing of the transcript on the same day, it will be presumed, in support of the proceedings, that the transcript was filed before the execution has issued. *Id.* The affidavit should specify the amount remaining unpaid, and although the omission to do so does not deprive the judge of jurisdiction to grant the order, it is an irregularity which furnishes good ground for the debtor's motion to set aside the order. *Douglas v. Mainzer*, 40 Hun, 75.

An affidavit for an order of examination in supplementary proceedings must show that the execution was issued to the sheriff of the county in which the debtor resided or had a place of business at the time of the commencement of the proceedings. *Matter of Zelic v. Vroman*, 22 Misc. 486, *sub nom. Zelic v. Vroman*, 50 Supp. 836, 84 St. Rep. 836.

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Form for Affidavit against Resident Debtor.

ULSTER COUNTY COURT.

Harrison Snyder

agst.

Solomon Bates.

ULSTER COUNTY, ss. :

Harrison Snyder, being duly sworn, says that on the 25th day of March, 1886, a judgment was rendered by the Supreme Court of the State of New York in favor of the said Harrison Snyder and against the said Solomon Bates, for \$520 damages and \$79 costs, and which said judgment is now owned by this deponent. That the judgment roll thereupon was duly filed in the office of the county clerk of the county of Ulster, and said judgment was duly docketed in said clerk's office on the day last aforesaid. (Or, that a transcript thereof was duly filed, and said judgment was duly docketed, in the Ulster County clerk's office on the 25th day of March, 1886.)

That said judgment was rendered upon the said judgment debtor's appearance (or upon the personal service of the summons upon said Solomon Snyder), and was duly docketed on said 25th day of March, 1886, in Ulster County clerk's office. That an execution was duly issued upon said judgment out of said court on the 1st day of April, 1886, against the property of said Solomon Bates, to the sheriff of the county of Ulster, where the said Solomon Bates resided (or has a regular place for the transaction of business in person) at the time of the commencement of this proceeding.

The said execution has, less than ten years since, and on the 26th day of June, 1886, been duly returned by said sheriff to the county clerk of the county of Ulster, wholly unsatisfied, and that the whole amount of said judgment is still unpaid, together with interest thereon from the 25th day of March, 1886. That no previous application has been made for an order in this matter.

(Jurat.)

(Signature.)

The affidavit upon which an order is granted must show that the proceedings are authorized by the judgment creditor. *Brown v. Walker*, 28 St. Rep. 36, 8 Supp. 59. It must show that a demand has been made that the debtor apply his property to the payment of the judgment, and must show also the means of the affiant's information. *Bowery Bank v. Widmayer*, 9 Supp. 629. An insurance agent having a desk in the office of the company has there a place for the transaction of business within the intent of § 2458, in the absence of proof that he is continuously

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absent from such office by the requirements of his business. *Batchelder v. Nugent*, 23 Civ. Pro. 178, 24 Supp. 828.

The words "an office" for the transaction of business in person, is equivalent to "a place" for the transaction of business in person. *Batchelder v. Nugent*, 23 Civ. Pro. 178, 24 Supp. 828, *supra*.

An affidavit for an order to examine a debtor in supplementary proceedings which states the jurisdiction facts solely on information and belief is insufficient, unless the sources of information and grounds of belief are stated. *Matter of Parrish*, 28 App. Div. 22, *sub nom. Pierce v. Parrish*, 50 N. Y. Supp. (84 St. Rep.) 735. An affidavit, made by the managing clerk of the attorney for the judgment creditor, on a motion for the examination of a third party in supplementary proceedings, stating that the third party "has personal property of N., the said judgment debtor above named, exceeding \$10 in value," is sufficient to warrant the issuing of an order for such examination. *Brucn v. Nickels*, 30 App. Div. 396, 51 N. Y. Supp. (85 St. Rep.) 352.

The affidavit for an order for examination must show that the execution was issued to the sheriff of the county in which debtor resided, or had a place of business at the time of the commencement of the proceeding, and the statement of the debtor's residence and place of business must not be in the disjunctive, or it is a jurisdictional defect, not cured by the debtor's appearance. *Matter of Zelig v. Vroman*, 22 Misc. 486, 50 Supp. 836, 84 St. Rep. 836. An affidavit which states the jurisdictional facts solely on information and belief must state the sources of information and grounds of belief, or it is insufficient. *Matter of Parrish*, 28 App. Div. 22, 50 Supp. 735. If the affidavit states that the judgment roll was filed in the county of the venue, and the transcript filed and docketed in another county to which the execution was issued, such affidavit is not defective in omitting to state a docket of the judgment in the first county, as the same will be presumed from the fact stated. *Ludlow v. Mead*, 21 St. Rep. 435, 3 Supp. 321. The omission of the judgment creditor to write his office and place of address on the copy of the affidavit and order is a mere irregularity and does not vitiate the service of the order, nor does it authorize the judge making the order to vacate the same on an *ex parte* application. *Dorsey v. Cummings*, 48 Hun, 76. An affidavit for an order for a second

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examination of the judgment debtor, must state the facts which lead the creditor to believe that money has come into the debtor's hands since the first examination. *Losee v. Allen*, 17 Misc. 275, 40 Supp. 349.

SUB. 4. THE ORDER AND PROCEEDINGS THEREON.

The general rule is that the order need not set out the facts requisite to give jurisdiction. *People v. Oliver*, 66 Barb. 570. A different rule is held in the Common Pleas. *Day v. Brosnan*, 6 Abb. N. C. 312. But if the order attempts to recite the facts it is said that it must recite them correctly, or the order will be set aside on application. *Hatch v. Weyburn*, 8 How. 163. Under the old Code, § 292, it was held that a non-resident of the State could only be required to be examined in the county where the judgment roll was filed. *Anway v. David*, 9 Hun, 296. An order which states no place where the judgment debtor is to appear is fatally defective. *Kelty v. Yerby*, 31 How. 95. Where the order fails to name a justice in the district where the debtor resides it is said to be fatal if promptly raised. *Shults v. Andrews*, 54 How. 376. An order requiring a debtor to appear "before me or some other justice of the court," etc., is not subject to objection on that account. The additional words are merely surplusage. *Bank for Savings v. Hope*, 8 Daly, 316; *Drener v. Van Pelt*, 15 How. 19. An order should not direct the proceedings to be sent to any other county than that in which the examination is had. *Pardee v. Tilton*, 20 Hun, 76. Where an order was made with the clause, "all subsequent proceedings shall be had before me," it was held this did not prevent any other officer having jurisdiction from granting an order against other parties based on the same judgment, that the phrase quoted should be construed to mean all subsequent proceedings under the same order. *First Nat. Bank v. Dering*, 8 Week. Dig. 261. It is irregular to require the debtor to appear before any judge other than the one who makes the order, except as provided in the section. *Vibert v. Frost*, 3 Abb. 119; *Haggerty v. Rodgers*, 15 id. 314, n. An order returnable on Sunday is a nullity, and may be disregarded. *Arctic Fire Ins. Co. v. Hicks*, 7 Abb. 204. Two orders for examination of a judgment debtor, which he must obey, cannot be in force at the same time. If a debtor refuses to obey an order, and a second

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one is obtained, he cannot be punished for contempt for disobeying the first. *Gaylord v. Jones*, 7 Hun, 480; *Allen v. Starving*, 26 How, 57; *Brockney v. Brien*, 37 id. 270. Where a judgment was recovered fifteen years before the proceedings, and execution issued fourteen years before, proceedings could not be maintained on return of an execution issued without leave of court. *Belknap v. Hasbrouck*, 13 Abb. 418, n. Where an execution had been issued and returned ten years previously, the order was held regular, though there was another execution outstanding not returned. *Owen v. Dupignac*, 17 How. 512.

The withdrawal of a proceeding by consent is no bar to subsequent order for examination. *Carter v. Clarke*, 7 Robt. 43. So where a motion to set aside an order has been granted, but no order entered thereon, no objection to a second order can be based on the pendency of the first proceeding. *Shultz v. Andrews*, 54 How. 376. No further orders should be made for examination unless it appears that the debtor has subsequently acquired property, or another execution been issued and returned, or new facts have come to the knowledge of the creditor. *Jurgenson v. Hamilton*, 5 Abb. N. C. 149; *Hamilton v. Morange*, 2 Law Bull. 58. The creditor must show facts to justify another examination, even where a judgment has been recovered on a former judgment. *Irwin v. Chambers*, 40 N. Y. Supr. 432; *Goodall v. Demarest*, 2 Hilt. 534; *Orr's Case*, 2 Abb. 457; *Grocers' Bank v. Bayaud*, 21 Hun, 203; *Selling v. McIntyre*, 5 Law Bull. 69; *Canavan v. McAndrew*, 20 Hun, 46. The rule that a judgment creditor will not be permitted to harass the debtor by repeated examinations does not apply where it does not appear that the first examination was concluded otherwise than by vacating the order authorizing it. *Methodist Book Concern v. Hudson*, 1 How. (N. S.) 517.

But an order should not be granted where an order of examination was outstanding based on another judgment between the same parties, there being no reference in the papers to the existence of such an order or allegation of newly acquired property. *Cromwell v. Spofford*, 4 Civ. Pro. 273. A judge has power to direct a judgment debtor to appear before a referee for examination. *Kaufman v. Thresher*, 10 Hun, 438.

A party must appear in obedience to the order, unless there is an entire want of jurisdiction, and objections may be urged on

 Art. 3. Order to Examine Debtor After Return of Execution.

the return day. *Shultz v. Andrews*, 54 How. 378; *Hilton v. Patterson*, 18 Abb. 245; *Arctic Fire Ins. Co. v. Hicks*, 7 id. 204; *Courtois v. Harrison*, 12 How. 359. The regularity of the judgment cannot be questioned in these proceedings. *Lederer v. Ehrenfeld*, 49 How. 403; *Saunders v. Hall*, 2 Abb. 418; *Courtois v. Harrison*, 1 Hilt. 109; *People v. Oliver*, 66 Barb. 570; *O'Neil v. Martin*, 1 E. D. Smith, 404; *Diossy v. West*, 8 Daly, 208. Nor can the validity of the execution be questioned. *Sanford v. Sinclair*, 8 Paige, 373; *Union Bank of Troy v. Sargeant*, 53 Barb. 422. But a stay may be granted the debtor to enable him to move to set aside the judgment or execution. *People v. Oliver*, 66 Barb. 570. And a stay was allowed one who was discharged in bankruptcy and had failed to set it up against the defendant. *World Co. v. Brooks*, 7 Abb. (N. S.) 212. The order should be vacated on proof of an insolvent's discharge. *Coursen v. Dearborn*, 7 Robt. 143; *Smith v. Paul*, 20 How. 97. The validity of the discharge cannot be tried in this proceeding. *Rich v. Salinger*, 11 Abb. 344; *Dresser v. Shufeldt*, 7 How. 85.

A debtor arrested on execution is deemed imprisoned while admitted to the jail limits, and while such imprisonment continues the right to supplementary proceedings is suspended. *Rothschild v. Quinzer*, 8 Abb. Dig. 802; *Hayes v. McCahill*, id. Under the old Code the proceedings could not be taken upon a judgment not *in personam*. *Bartlett v. McNeil*, 49 How. 55. As to what is necessary under present Code, § 2458 is explicit. The docket of a judgment of the United States court with the county clerk does not authorize the proceeding. *Tompkins v. Purcell*, 12 Hun, 662, cited with approval, *Goodyear Dental Vulcanite Co v. Frisselle*, 22 id. 174. Questions as to the truth of the affidavit on which the order is made should be raised by a motion to set aside the proceedings; they cannot be first raised on a motion to commit for contempt. *Hilton v. Patterson*, 18 Abb. 245. Such motion to vacate or modify the order may be made on notice. *Lindsey v. Sherman*, 5 How. 308. If the execution is voidable the question must be raised in a direct proceeding for that purpose. *N. S. L., etc., Co. v. Pike*, 2 Law Bull. 31. Where the facts upon which the defendant claims a judgment in an action was paid, and the right to set off certain claims the defendant had against the party was disputed, *held*, the

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proper remedy for defendant was by motion to have the judgment decree satisfied of record. *Austin v. Byrnes*, 8 St. Rep. 88. The presumption of payment of a judgment after a lapse of twenty years does not operate to abate Supreme Court proceedings commenced before the lapse of that period. *Driggs v. Williams*, 15 Abb. 477. Appearance without objection waives irregularities. *Bingham v. Disbrow*, 37 Barb. 24; *Vibert v. Frost*, 3 Abb. 119; *Underwood v. Sutcliffe*, 10 Hun, 453, reversed on another point, 77 N. Y. 58. See, however, *Hinds v. Canaan R. R. Co.*, 10 How. 487; *DeComeau v. People*, 7 Robt. 498. It is the duty of the debtor, in case of absence of the judge or referee, to wait a reasonable time for his arrival.

Form for Order.

ULSTER COUNTY COURT.

Harrison Snyder

agst.

Solomon Bates.

Proof having been made to me by the affidavit of Harrison Snyder, that judgment was rendered by the Supreme Court of this State upon personal service of the summons in favor of said Harrison Snyder against the said Solomon Bates, for the sum of \$699, damages and costs, and the judgment roll thereupon filed in the Ulster County clerk's office on the 25th day of March, 1886, and said judgment duly docketed in the Ulster County clerk's office on the 25th day of March, 1886, and that execution was duly issued thereupon on the 25th day of March, 1886, out of the Supreme Court, against the property of said Solomon Bates, to the sheriff of the proper county, and that said execution has been since duly returned by said sheriff, on the 26th day of June, 1886, to the Ulster County clerk's office wholly unsatisfied, and that said judgment still remains wholly unsatisfied :

Now, on the application of Charles Davis, attorney for the said Harrison Snyder, I do hereby order that the said Solomon Bates is hereby required, pursuant to law, to attend before me, a justice of the Supreme Court, residing in the third judicial district, at, etc., on, etc., at ten o'clock in the forenoon, to be examined concerning his property.

And I do hereby enjoin the said Solomon Bates from making or suffering any transfer or other disposition of, or interference with, the property of the said Solomon Bates until further direction in the premises. (Or, as above to word "before" and from thence as follows : John F. Cloonan, who is hereby designated and appointed as referee for that purpose, at, etc., on, etc., at ten o'clock in the

 Art. 4. Order to Examine Debtor Before Return of Execution.

forenoon to be examined concerning his property, and that said referee certify to me all the evidence and the other proceedings taken before him.) (Signature of Judge.)

A dismissal of supplementary proceedings on account of the creditor's default does not bar another proceeding, but where the examination on the first proceeding was completed and signed, though not verified, a second order for examination will be vacated on the condition that the judgment debtor verifies such examination. *Weiss v. Ashman*, 11 Misc. 377, 65 St. Rep. 290, 32 Supp. 161, 24 Civ. Pro. 268.

The first order for examination of a judgment debtor is not superseded by a second order obtained to examine him as to property subsequent to the first order. *Walter v. Pecare*, 32 St. Rep. 841, 11 Supp. 146. The granting of a second order is discretionary, and the rule that the second order should not be granted, unless good reasons are shown, does not go to jurisdiction. *Marshall v. Link*, 36 St. Rep. 60, 13 Supp. 224, 20 Civ. Pro. 109. Where a motion is made to vacate a second order, the creditor may show, even more thoroughly than upon an *ex parte* application, that the application for the second order is not made to harass the debtor but to reach subsequently acquired property. *Marshall v. Link*, 36 St. Rep. 60, 13 Supp. 224, 20 Civ. Pro. 109 (*supra*). In order to obtain an order for examination of a judgment debtor the judgment creditor must show a demand for the application of the debtor's property to the payment of the judgment. *Levy v. Becham*, 64 Hun, 62, 46 St. Rep. 51, 18 Supp. 748.

ARTICLE IV.

ORDER TO EXAMINE DEBTOR BEFORE RETURN OF EXECUTION. § 2436.

§ 2436. Order to examine debtor before return of execution.

At any time after the issuing of an execution against property, as prescribed in § 2458 of this act, and before the return thereof, the judgment creditor, upon proof, by affidavit or other competent written evidence, that the judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, is entitled to an order requiring the judgment debtor to attend and be examined concerning his property at a time and place specified in the order.

An affidavit, in the language of the statute, confers jurisdiction, but, as it states conclusions and not facts, it is irregular; it may be amended or the defect waived. It must show a demand

 Art. 5. Order to Examine Person Having Property of Judgment Debtor.

of, and refusal by, the debtor to apply the property. *First National Bank v. Wilson*, 13 Hun, 232. And the order cannot be made unless the property is not subject to levy, or is so kept that it cannot, with due diligence, be reached by execution. *Sackett v. Newton*, 10 How. 560. An affidavit which states as a ground for examination upon information and belief that the debtor unjustly refuses to apply property toward the satisfaction of the judgment is insufficient; the affidavit should state the name of his informant, with his means of knowledge, and describe the property and also allege a demand. *Manken v. Pape*, 65 How. 453. The proceeding is purely statutory, and not in the course of the common law or one extending the remedial power of the court to collect its own judgment, and there must be proof of the material facts required to be stated or no jurisdiction exists. When the affidavit does not show that the debtor resides in the same county with the officer, but resides out of the State, having a place of business here, the officer does not get jurisdiction, notwithstanding the debtor's appearance. So held under the old Code, § 292. *Driggs v. Smith*, 47 How. 215.

The forms under § 2545 can be readily adapted to this section.

ARTICLE V.

ORDER TO EXAMINE PERSON HAVING PROPERTY OF JUDGMENT DEBTOR. § 2441.

§ 2441. Order to examine person having property, etc., of judgment debtor.

Upon proof, by affidavit or other competent written evidence, to the satisfaction of the judge, that an execution against property has been issued as prescribed in § 2458 of this act, and either that it has been returned wholly or partly unsatisfied, or that it has not been returned, and also that any person or corporation has personal property of the judgment debtor exceeding ten dollars in value, or is indebted to him in a sum exceeding ten dollars, the judgment creditor is entitled to an order requiring that person or corporation to attend and be examined concerning the debt, or other property, at a time and place specified in the order. The judge may, in his discretion, require notice of the subsequent proceedings to be given to the judgment debtor in such a manner as he deems just. But a receiver shall not be appointed without such a notice except as otherwise prescribed in article second of this title.

The case of *Brett v. Browne*, 1 Abb. (N. S.) 155, seems to be superseded as to the necessity for proof of value of property in hands of third person by language of the section fixing amount. The affidavit cannot be in the alternative, that the third person

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has property of the judgment debtor, or is indebted to him, etc. *Davis v. Henig*, 65 How. 94; *Lee v. Heiberger*, 1 C. R. 38. It must state the county in which the person sought to be examined resides, or, if a non-resident, where he has a place of business. *Foster v. Pierce*, 8 Abb. 407. This section seems to settle the question that the proceeding is independent of proceedings against the debtor, a controversy which much vexed the courts under the old Code. *McBride v. Farmers' Bank*, 28 Barb. 476; *Graves v. Lake*, 12 id. 33; *Kemp v. Harding*, 4 id. 178. The affidavit need not show that the person has property which he unjustly refuses to apply, etc. *Potts v. Davidson*, 1 How. (N. S.) 216. In *People v. Jones*, 1 Abb. N. C. 172, it was held allegations upon information and belief were insufficient on proceedings for contempt. But *Miller v. Adams*, 52 N. Y. 409, is authority for the proposition that an affidavit that the person whose examination is desired has property of the judgment debtor in his hands, or is indebted to him, as the deponent is advised and believes, is sufficient to confer jurisdiction upon the judge to grant the order, and it seems that such an affidavit meets all the requirements of the section, and would be held sufficient to sustain the order upon a direct proceeding to set it aside.

One who owes money, though not yet payable, may be summoned as a debtor to the judgment debtor. *Davis v. Hercig*, 65 How. 290. A third person, on whom the order is served, cannot disregard the order on the ground that the affidavit on which it was granted was insufficient. He must move to set it aside. *Wilcox v. Harris*, 59 How. 262. An execution creditor of a municipal corporation may have an order to examine a person indebted to or having funds of defendant; an officer of such corporation having funds in his hands may be examined. *Lowber v. Mayor*, 5 Abb. 268. Where a joint-stock association is sued in the name of its president or treasurer, that does not make him a defendant. He is subject to be examined on showing him to be indebted to the association. *Courtois v. Harrison*, 12 How. 359. Proceedings may be instituted for the examination of a third person after the examination of the debtor has ended and a receiver has been appointed. *Lockwood v. Worstell*, 15 Abb. 430, n., and examination may proceed and a receiver be appointed, though an attachment has issued against all the judgment debtor's property. *Hanson v. Tripler*, 3 Sandf. 733. But a re-

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ceiver of a foreign corporation, appointed in another State, will not be subjected to an examination or required to pay over moneys due a judgment debtor. *Smith v. McNamara*, 15 Hun, 447. A bank holding funds of a bankrupt estate, as depository of the Bankrupt Court of the United States, was held, in supplementary proceedings upon a judgment against the assignee, not to be a corporation holding funds of the judgment debtor within the provision. *Havens v. National Bank*, 4 Hun, 131. The salary of the debtor cannot be reached by service of an order on his employer the day before it is due and payable. *First National Bank v. Beardsley*, 8 Week. Dig. 7. The rule as to whether or not notice shall be given to the judgment debtor was held differently in several cases under the former Code. *Holmes v. Jordan*, 15 Abb. 410, n.; *DeComcau v. People*, 7 Robt. 498; *Gibson v. Haggerty*, 37 N. Y. 555; *Lynch v. Johnson*, 48 id. 27.

The examination of a third person cannot be had where the debtor is a corporation. *Fitchburg National Bank v. Bushwick Chemical Works*, 13 Civ. Pro. 155. If the judgment creditor had already examined two persons and discovers sufficient property to satisfy his claim, an order for the examination of still another person, as one holding property of the debtor, is unnecessary and will be vacated. *Crane v. Beecher*, 6 Supp. 225, 26 St. Rep. 233.

Proceedings for the examination of a third person indebted to the judgment debtor cannot be instituted through the county judge of the county where such person resides, on the strength of an execution in the hands of the sheriff of such county, if the judgment debtor resides in another county where the judgment was recovered, and which execution has there been returned unsatisfied. A proceeding should only be had in aid of an execution issued to the sheriff of the county in which the judgment debtor resides, and they should be conducted before the judge authorized to make the order in such county. *Merrill v. Allin*, 46 Hun, 623.

An affidavit is sufficient which alleges on information and belief that the person sought to be examined has personal property of the judgment debtor exceeding \$10 in value, although the sources of the information is not stated. *Tefft v. Epstein*, 17 Civ. Pro. 168.

A third party who is required to attend supplementary pro-

 Art. 5. Order to Examine Person Having Property of Judgment Debtor.

ceedings and be examined as to the property in his possession belonging to the judgment debtor is not entitled to witness fees as a condition to his obedience to the order. *Heckman v. Bach*, 20 Abb. N. C. 401.

In an affidavit for an order to examine a third person, statements on information and belief, without stating the sources of information or the grounds of belief, are sufficient to authorize the granting of the order. *Grinnell v. Sherman*, 33 St. Rep. 27, 11 Supp. 682. An affidavit for the examination of a third person which states in the alternative that said third person has personal property of the judgment debtor, or is indebted to him, is defective and an order should not be granted thereon. *Collins v. Beebe*, 54 Hun, 318, 27 St. Rep. 4, 7 Supp. 442. The affidavit for an order for the examination of a third person must show, in order to give jurisdiction, that the execution on which the proceeding is based, was issued to the sheriff of the county where the judgment debtor resided at the commencement of the proceeding. *Schenck v. Irwin*, 60 Hun, 361, 38 St. Rep. 603, 15 Supp. 55, 21 Civ. Pro. 96. The order of examination should be vacated if it appears that when it was granted the judgment debtor was the owner and seized in fee of real estate in the county. *Eleventh Ward Bank v. Heather*, 21 Misc. 539, 47 Supp. 718, 81 St. Rep. 718. A notice of motion to set aside an order for a jurisdictional defect is not objectionable on the ground that it does not point out the defect. *Matter of Zelig v. Vroman*, 22 Misc. 486, *sub nom.* 50 Supp. 836, 84 St. Rep. 836. If the affidavit for an order for the examination of a third person does not state the residence of the judgment debtor, at the time the affidavit is made, such affidavit is insufficient. *Francy v. Smith*, 88 Hun, 215, 68 St. Rep. 714, 34 Supp. 780. And so, too, if the affidavit for an order for the examination of the third person states the residence and office for business of the judgment debtor in the alternative, or where it fails to state the sources of information and grounds of belief of allegations, it is defective. *Leonard v. Bowman*, 40 St. Rep. 135, 21 Civ. Pro. 237.

An affidavit for an order for examination of a third party which alleges, upon information and belief, that such person has property of the debtor, and which does not give the sources of the information, is insufficient to sustain an order for examination. *Matter of Leslie*, 19 Misc. 667, 44 Supp. 1103.

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But it has been held elsewhere that an affidavit for the order of examination of a third person, made on information and belief, is sufficient, although it does not state the sources of information. *Tefft v. Epstein*, 7 Supp. 897, 17 Civ. Pro. 168; *Grinnell v. Sherman*, 33 St. Rep. 27, 11 Supp. 682. An order to examine a third party based on an affidavit, solely on information and belief, is not void and must be obeyed until vacated. *Matter of Parrish*, 28 App. Div. 22, 50 Supp. 735. The order for the examination of a third person may be made by a judge outside of the district where the debtor resides, but all the subsequent proceedings and the examination of the third person must be made before a judge of the district where the debtor resides. *Gildersleeve v. Lester*, 69 Hun, 344, 23 Supp. 471, 53 St. Rep. 316. And a county judge of a county other than that where the debtor resides cannot grant an order for the examination of the third person and has no jurisdiction. *Schenck v. Erwin*, 63 Hun, 104, 43 St. Rep. 862, 17 Supp. 616. Upon an examination of a third person, costs should be allowed against the judgment debtor. *Grinnell v. Sherman*, 33 St. Rep. 27, 11 Supp. 682. If there has been an order for the examination of a third person who is an executor, and if the proceeding is adjourned on the stipulation that the judgment will be paid from the first moneys coming into the hands of executors which belong to the debtor, a subsequent order to examine the other executor is unauthorized, unless it appear that property belonging to the judgment debtor has come into the hands of the executors since the adjournment. *Crane v. Beecher*, 26 St. Rep. 233, 6 Supp. 225.

The order for the examination of a third person under this section is appealable and is not within subdivision 1 of § 2433. *Leavey v. Swick Piano Co.*, 17 Misc. 145, 39 Supp. 409. Even if the affidavit upon which an order against a third person is made be defective, the order itself is not void, and cannot be treated as a nullity; and it is no excuse by a party ignoring such order that he had been advised that the affidavit was defective. *Matter of Fleming v. Tourgee*, 40 St. Rep. 704, 16 Supp. 2, 21 Civ. Pro. 297.

A order for the examination of a third party will not be superseded merely because the execution has been returned after the granting of such order. *Lingsweiler v. Lingsweiler*, 29 St. Rep. 354, 9 Supp. 305, 18 Civ. Pro. 81, 57 Super. Ct. 395. An

 Art. 5. Order to Examine Person Having Property of Judgment Debtor.

order directing the judgment to be paid out of the income of the judgment debtor from a fund held by a trustee is proper, where such trustee, on a third party order, testifies that he has in his hands such accrued income payable to the debtor. *Lawrence v. Pease*, 50 St. Rep. 851, 21 Supp. 223.

An affidavit by the managing clerk of the judgment creditor's attorney, stating that a third party has personal property of the debtor exceeding ten dollars in value, is sufficient for the issuing of an order for the examination of such third person. *Bruen v. Mckels*, 30 App. Div. 396, 51 Supp. 352. The rule that a third party order cannot be had against a public disbursing officer to reach salary due to a public officer, applies to the captain of the police force, who has collected the salary of an officer, as his agent, and as a matter of convenience. *Gray v. Ashley*, 24 Misc. 396, 53 Supp. 547. A third party, upon his examination, must answer questions which tend to show that the consideration for a transfer by the judgment debtor was inadequate, and was a subterfuge and fraudulent as to creditors. *Matter of Millar v. Weaver*, 22 Misc. 254, 53 Supp. 259. In an affidavit for an order for the examination of a third person, an omission to state the residence of the debtor at the time of the proceedings is a fatal defect. *Matter of Gagnon*, 32 App. Div. 22, 52 Supp. 309.

Precedent for Affidavit.

SUPREME COURT.

John Binninger <i>agst.</i> Joseph Hoag.
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COUNTY OF ULSTER, SS. :

John Binninger, of said county, being duly sworn, says that he is the above plaintiff; that judgment was rendered in this action against said Joseph Hoag, defendant above named, on the 24th day of January, 1887, for \$500 damages, and \$95.40 costs, upon the judgment debtor's personal appearance or personal service of the summons upon him, and the judgment roll filed and judgment docketed on that day in the office of the clerk of the county of Ulster. That an execution thereon against the property of the said Joseph Hoag was issued and delivered on the 25th day of January, 1887, to the sheriff of the county of Ulster, where said Joseph Hoag then resided and still resides, and has an office for the regular transaction of business

Art. 5. Order to Examine Person Having Property of Judgment Debtor.

in person at Rosendale, Ulster County, N. Y. (if non-resident erase statement as to residence and add in blank the facts required by § 2458). That this said execution has been returned (add in blank facts required by § 2458). That such return was made within ten years (if not returned erase this clause). That no previous application has been made for the order asked hereon. That Samuel Johnson, of the city of Kingston, Ulster County, N. Y., has property of said Joseph Hoag, and is indebted to said Joseph Hoag in an amount exceeding \$10. That said Samuel Johnson resides and has an office for the regular transaction of business in person at Kingston City, said county (if non-resident erase statement as to residence and add in blank the facts required by § 2458).

JOHN BINNINGER.

Subscribed and sworn to before me, }
 this 4th day of June, 1887. }
 M. S. DECKER,
Notary Public.

Precedent for Order.

SUPREME COURT.

John Binninger

agst.

Joseph Hoag.

It appearing to me by the affidavit of Joseph Binninger, that judgment had been recovered in this action in favor of said Joseph Binninger, plaintiff above named, against said Joseph Hoag, the above defendant, rendered upon the judgment debtor's personal appearance, or personal service of the summons upon him for a sum not less than \$25 exclusive of costs, and that an execution against the property of the said Joseph Hoag, the judgment debtor in this action, has been duly issued to the sheriff of the proper county upon the judgment herein, and has been returned wholly unsatisfied; that said execution was so returned within ten years; and that Samuel Johnson, of the city of Kingston, Ulster County, N. Y., has property of the judgment debtor, and is indebted to him, in an amount exceeding \$10:

I do hereby order and require the said Samuel Johnson to appear before Ashley W. Cooper, hereby appointed a referee for that purpose, at his office, 60 Wall Street, in the city of Kingston, on the 9th day of June, 1887, at ten o'clock in the forenoon, to be examined and answer concerning the same. And the said Joseph Hoag and the said Samuel Johnson are hereby severally forbidden and enjoined from making or suffering any transfer or other disposition of, or interference with, the property of said Joseph Hoag not exempt from levy and sale by virtue of an execution, or the property or debt con-

Art. 6. Injunction Order ; When Granted.

cerning which said Samuel Johnson is required to attend and be examined, until further direction in the premises.

Dated the 4th day of June, 1887.

WILLIAM S. KENYON,
Ulster County Judge.

ARTICLE VI.

INJUNCTION ORDER ; WHEN GRANTED. § 2451.

§ 2451. Judge may enjoin transfer, etc., of property.

The judge by whom the order or warrant was granted, or to whom it is returnable, may make an injunction order, restraining any person or corporation, whether a party or not a party to the special proceeding, from making or suffering any transfer or other disposition of, or interference with, the property of the judgment debtor, or the property or debt, concerning which any person is required to attend and be examined until further direction in the premises. Such an injunction order may be made simultaneously with the order or warrant, by which the special proceeding is instituted, and upon the same papers ; or afterwards, upon an affidavit, showing sufficient grounds therefor. The judge or the court may, as a condition of granting an application to vacate or modify the injunction order, require the applicant to give security, in such a sum and in such a manner as justice requires.

This section, as it now stands, seems to change the rule laid down in *Green v. Bullard*, 8 How. 313, to the effect that the order in this proceeding is not an injunction. The details are much fuller than those of § 299 of the old Code, for which it is a substitute. A judgment debtor who has been served with an order for appearance and examination in proceedings supplementary to execution, which forbids him from transferring any of his property until further directions, is not guilty of contempt in applying his earnings for services rendered within sixty days before the commencement of the proceedings to the support of his family. The Code of Civil Procedure does not authorize any interference with such earnings, and it is not necessary for the debtor to secure permission of the court or judge before making such application. The provision of the Code, that the facts constituting the exemption shall be made to appear by the oath of the debtor or otherwise, is answered by putting upon the debtor the burden of justifying the use of his earnings when called upon to transfer the money to the sheriff or receiver. *Hancock v. Scars*, 93 N. Y. 79, reversing 29 Hun, 96, and overruling *Newell v. Cutler*, 19 id. 74. Where, in proceedings supplemental to execution, an order is issued restraining a third person from disposing of property belonging to the judgment debtor "until further

Art. 7. Service of Order, Injunction, or Warrant.

order in the premises," an order appointing a receiver is such further order; it is the final order in the proceedings, and any restraint thereafter desired should be inserted in that order. *People v. Randall*, 73 N. Y. 416. An injunction restraining executors from applying the proceeds of a trust to the use of the *cestui que trust* is improper. All that can be reached to be applied in satisfaction of a judgment is the surplus beyond what is necessary for the judgment debtor's support, and this can only be done by an equitable action. See *Williams v. Thorn*, 78 N. Y. 270; *Morgan v. Von Kohnstamm*, 60 How. 161; *Locke v. Mabbett*, 2 Keyes, 457; *Campbell v. Foster*, 35 N. Y. 361; *Graff v. Bonnett*, 31 id. 9. An irregularity in obtaining the injunction is not waived by a motion to dissolve it. *Wilkie v. Roch*, 5 Week. Dig. 352. As to what does not constitute a violation of an injunction, see *Buller v. Niles*, 35 How. 329; *Morris v. First National Bank*, 68 N. Y. 362; *Glenville Woolen Co. v. Ripley*, 43 id. 206. As to what does constitute a violation, see *People v. Kingsland*, 3 Keyes, 325; *The Deposit National Bank v. Wickham*, 44 How. 421. The injunction clause in an order does not apply to property received by the debtor subsequent to the service of the order. *McGivney v. Childs*, 41 Hun, 607; see, however, *Gillett v. Hilton*, 11 Civ. Pro. 108. A stay of proceedings upon a judgment merely suspends supplementary proceedings thereon, and if the debtor conveys his property, pending the stay, in violation of the injunction contained in the order for examination, he is guilty of contempt. *Woolf v. Jacobs*, 36 N. Y. Super. 408.

The injunction order in supplementary proceedings refers only to property or debts existing when the same is served on the judgment debtor. *Raynsford v. Temple*, 3 Misc. 294, 52 St. Rep. 257, 22 Supp. 937, modifying 2 Misc. 454, 51 St. Rep. 144, 21 Supp. 1039.

ARTICLE VII.

SERVICE OF ORDER, INJUNCTION, OR WARRANT. §§ 2452, 2453.

§ 2452. Mode of service of certain orders.

An injunction order, or an order requiring a person to attend and be examined, made as prescribed in this article, must be served as follows:

1. The original order, under the hand of the judge making it, must be exhibited to the person to be served.

 Art. 8. Reference When and How Granted and Proceedings Thereon.

2. A copy thereof, and of the affidavit upon which it was made, must be delivered to him.

Service upon a corporation is sufficient if made upon an officer, to whom a copy of a summons must be delivered, where a summons is personally served upon the corporation; unless the officer is specially designated by the judge, as prescribed in § 2444 of this act.

§ 2453. Service of a warrant.

The sheriff, when he arrests a judgment debtor by virtue of a warrant, issued as prescribed in this article, must deliver to him a copy of the warrant, and of the affidavit upon which it was granted.

Where the order requiring the judgment debtor to appear and submit to an examination is not served upon him until after the return day specified therein, no jurisdiction is acquired by the subsequent appearance of said debtor for the purpose of raising objection of total want of jurisdiction, and the objection may be raised at any stage of the proceedings. *Henderson v. Stone*, 40 How. 333. But where a sheriff's certificate of service was made, although not sufficient evidence, yet an appearance was held to cure the defect. *Utica City Bank v. Buell*, 17 How. 498. And an irregularity in service is waived by appearance and submitting to an examination without objection. *Billings v. Carver*, 54 Barb. 40; *Newell v. Cutler*, 19 Hun, 74. Where the debtor, after being served, moved to vacate the order, and on such motion an order was made denying it, and ordering the debtor to appear on a day named, it was held the last-mentioned order need not be served personally. *Johnson v. Tuttle*, 17 Abb. 315.

The order for examination in these proceedings may be served upon the judgment debtor while attending court as a witness, if he be a resident of the State. *Fletcher v. Franchó*, 15 Supp. 674, 21 Civ. Pro. 34. The service of the order in supplemental proceedings gives the judgment creditor the priority of a vigilant creditor, and creates a lien upon the equitable assets of his debtor. *Duffy v. Dawson*, 2 Misc. 401, 50 St. Rep. 584, 21 Supp. 978. Defective service can only be set aside upon notice and not upon an *ex parte* application. *Dorsey v. Cummings*, 48 Hun, 76.

ARTICLE VIII.

REFERENCE WHEN AND HOW GRANTED AND PROCEEDINGS THEREON. §§ 2442, 2443, 2445.

§ 2442. Either order may require attendance before a referee.

An order, requiring a person to attend and be examined, made pursuant to any

 Art. 8. Reference When and How Granted and Proceedings Thereon.

provision of this article, must require him so to attend and be examined, either before the judge to whom the order is returnable, or before a referee designated therein. Where the examination is taken before a referee, he must certify, to the judge to whom the order is returnable, all the evidence and the other proceedings taken before him.

§ 2443. Reference may be ordered at any time.

At any stage of the proceedings the judge to whom the order is returnable may, in his discretion, make an order directing that any other examination, or testimony, be taken by, or that a question arising be referred to, a referee, designated in the order. Where a question is so referred, the referee may be directed to report either the evidence or the facts.

§ 2445. Referee to be sworn.

Unless the parties expressly waive the referee's oath, a referee, appointed as prescribed in this article, must, before entering upon an examination or taking testimony, subscribe and take an oath that he will faithfully and fairly discharge his duty upon the reference, and make a just and true report, according to the best of his understanding. The oath may be administered by an officer designated in § 842 of this act, and must be returned to the judge, with the report or testimony.

In support of an order to appear before a referee, it will be presumed that there was an order appointing a referee. *Lewis v. Penfield*, 39 How. 490. A justice of the Supreme Court may appoint a referee to hold sessions in any county in the State. He need not reside in the county of the party to be examined, or where the examination is taken. *Bingham v. Disbrow*, 37 Barb. 24; *Wilson v. Andrews*, 9 How. 39. If the referee dies or the proceeding fails for any reason, the judge before whom the proceedings are pending may appoint another referee. *Allen v. Starring*, 26 How. 57. Where the judge made an order substituting another referee in place of the one named in the original order, and directed the debtor to appear and answer before him at a time and place stated, it was held by the Court of Appeals that the judge had power to make the order, and whether he should exercise this power rested in his discretion, and the order was not reviewable there. *Pardee v. Tilton*, 83 N. Y. 623. The referee may be appointed *ex parte*, but if objectionable, application should be made to the judge who appointed him, to vacate the order. *Conway v. Hitchins*, 9 Barb. 378; *Hulsaver v. Wiles*, 11 How. 446; *Tremain v. Richardson*, 68 N. Y. 617. It is said in *Hollister v. Spafford*, 3 Sandf. 742, that when it becomes evident a protracted examination is likely to ensue a referee will be appointed. In practice in the city of New York, a referee is appointed, or the debtor is sworn by the judge, and he and counsel retire to another room for the exam-

Art. 8. Reference When and How Granted and Proceedings Thereon.

ination. In most of the counties the county judge hears the examination, the creditor's attorney taking down the evidence. When the judge appoints a referee, but does not name the time or place for hearing, but merely directs the debtor to appear, as required by the referee, the referee may issue a summons for his appearance. And disobedience thereto is a contempt. *Redmond v. Goldsmith*, 2 Law Bull. 19. An order may direct a debtor to appear before a referee for examination, and before the judge on the Monday succeeding his examination; on that day a receiver may be appointed, whether the debtor appears or not, and if he fails to appear he may be put in contempt. *Sickles v. Hanley*, 4 Abb. N. C. 231. In proceedings before a referee, discontinuance, or the imposition of costs, should not be had, or made before the report of the referee, and both parties should have notice of any application founded on the report. *Kennedy v. Norcott*, 54 How. 87. A referee is not to prosecute the inquiry, but to take the evidence drawn out by plaintiff's counsel. *Korotowsky v. Leipsig*, 52 How. 410.

Where a judge in the order directs the examination to be before a referee, such referee may issue a subpoena to a third person to appear before him and testify as a witness, and a refusal to obey such subpoena and to be sworn and testify is punishable as a contempt. *Howe v. Welch*, 11 Civ. Pro. 444. Upon a judgment recovered in the city court of New York, the judge of such court has power to appoint a referee in supplementary proceedings. *People v. Levy*, 16 Misc. 615, 40 Supp. 743, 25 Civ. Pro. 390. If the judgment debtor has appeared and waived the objection that the referee appointed in supplementary proceedings occupies the same office that the attorney for the judgment creditor, a motion to remove the referee on such grounds will be denied. *Rouse v. Goodman*, 8 Misc. 691, 58 St. Rep. 830, 28 Supp. 524. The judgment debtor should be given reasonable notice of his examination, and thus where a person living in the country received only three hours and a half notice of examination to take place in a village the time was too short. *Gibbs v. Prindle*, 9 App. Div. 29, 41 Supp. 132. The examination of the debtor is a court record and should be filed, if filing is demanded, even though such examination be incomplete. *Falkenberg v. Frank*, 20 Misc. 692, 46 Supp. 675; *Matter of Falkenberg*, 19 Misc. 418, 43 Supp. 1137.

ARTICLE IX.

HEARING BEFORE JUDGE OR REFEREE. § 2444.

§ 2444. Proceedings upon examination ; adjournment.

Upon an examination under this article, each answer of a party or witness examined must be under oath. A corporation must attend by, and answer under the oath of, an officer thereof; and the judge may, in his discretion, specify the officer. Either party may be examined as a witness, in his own behalf, and may produce and examine other witnesses, as upon the trial of an action. The judge or referee may adjourn any proceedings, under this article, from time to time, as he thinks proper.

Substituted for Co. Pro. §§ 292 and 296, or such parts thereof as relate to examinations.

These proceedings, are special proceedings, and all papers should be filed and entered in the county clerk's office. *People ex rel. Gottchius v. McGoldrick*, 67 St. Rep. 289, 33 Supp. 441, 24 Civ. Pro. 292. The production of books of a corporation which it is claimed is property of the debtor in its possession, can only be obtained through subpoena *duces tecum* served upon the officer who has power to produce the books, subpoena on a mere employe is insufficient. *Wainright v. Tiffany*, 13 Civ. Pro. 222. A corporation which has done business with the judgment debtor may be examined as a witness through its officers, and can be compelled to produce its books and papers. *Pendergast v. Dempsey*, 10 Supp. 938, 18 Civ. Pro. 198; *Semmes v. Noell*, 18 Civ. Pro. 200. A judgment debtor may be examined upon supplementary proceedings as to property owned by him prior to the time of making an assignment for the benefit of creditors, and as to what disposition he has made of it. *Schuri v. Altman*, 8 Civ. Pro. 242, 16 Abb. N. C. 312; compare *Seligman v. Wallach*, 16 Abb. N. C. 317. Though a witness in supplementary proceedings is not entitled to counsel as a matter of right, yet, counsel should not be arbitrarily excluded from participating in such examination. *Schwab v. Cohen*, 13 St. Rep. 709. The absence of the referee at the time appointed does not terminate the proceedings, but the same may continue by an order of the judge directing the examination to proceed at a later day. *Keihen v. Shipherd*, 4 Supp. 339, 16 Civ. Pro. 183. Where the referee appointed in supplementary proceedings fails to appear at the time set, the proceeding is not terminated but may be revived by order. *Keihen v. Shipherd*, 24 St. Rep. 739, 4 Supp. 339, 16 Civ. Pro. 183. The witnesses upon examinations in

Art. 9. Hearing Before Judge or Referee.

these proceedings may be sworn by a commissioner of deeds. *Blake v. Bolte*, 10 Misc. 333, 63 St. Rep. 408, 31 Supp. 124, 24 Civ. Pro. 166. The testimony given either by the judgment debtor or by a third party upon the examination in these proceedings is competent evidence against both the judgment debtor and the third party in an action subsequently brought by a creditor of the judgment debtor, to set aside a conveyance made by him to such third party. *Kain v. Larkin*, 4 App. Div. 209, 74 St. Rep. 189, 38 Supp. 546.

Though a judgment debtor may be required to produce his books and papers upon the examination, yet, he cannot be compelled to leave them with the referee to be inspected by the creditors during an adjournment. *Barnes v. Leavey*, 29 Supp. 1076, 23 Civ. Pro. 253. The referee may adjourn an examination to a different place, if it be done for good cause and be reasonable, and if the place to which the adjournment is made is within the county where the debtor resides. *Weaver v. Brydges*, 85 Hun, 503, 66 St. Rep. 742, 33 Supp. 132. The mere omission from the record of a regular adjournment of the proceedings will not be presumed to show a loss of jurisdiction, and any irregularity in an adjournment is waived by the subsequent appearance of the debtor and his submission to examination without objection. *Robertson v. Hay*, 12 Misc. 7, 66 St. Rep. 530, 33 Supp. 31.

The debtor must appear in person before the judge, or referee, and mere presence is not sufficient if he does not answer when called. *People v. Wilgus*, 5 Den. 58. Either party, in the absence of the other, must wait a reasonable time, and where the debtor failed to wait a reasonable time for the judge, it was held the injunction ordered remained valid. *Reynolds v. McElhone*, 20 How. 454. The attendance of a witness is properly procured by subpœna, issued out of the court in which the judgment is obtained, and disobedience to such subpœna should be tried and punished by the court. *People v. Dutcher*, 3 Abb. (N. S.) 151.

A witness appearing and being examined is bound to answer proper questions whether he has been subpœnaed or not. *People v. Marston*, 18 Abb. 267. Leading questions to the debtor are allowable. *Corning v. Tooker*, 5 How. 17. The debtor may be cross-examined on his own behalf. *Leroy v. Halsey*, 1 Duer, 589; *Sanford v. Carr*, 2 Abb. 462.

Art. 9. Hearing Before Judge or Referee.

The provisions of the statute are intended to give authority for a full and complete examination of the debtor concerning the amount and value of his property, as well as to any disposition he has made, or attempted to make of it. The creditor is entitled to examine his debtor once as fully as may be. *Forbes v. Willard*, 37 How. 193; S. C. 54 Barb. 520; *Canavan v. McAndrew*, 20 Hun, 46. Where a witness having been served with a subpoena *duces tecum* refused to produce certain papers, on the ground that they related to his private affairs, it was held that it was for the court, on inspection, to decide as to the relevancy and materiality of the papers, that the creditor may make searching inquiry, and that an interested witness should be strictly dealt with. *Champlin v. Stoddard*, 17 Week. Dig. 76. Where it appears upon an examination that a judgment creditor has transferred property to a witness, the latter is bound to answer all questions touching the transfer, and seeking for information bearing upon the question whether such transfer was for a good consideration, and was honest or fraudulent, and upon his refusal to answer, he is liable to be punished as for a contempt. *Lathrop v. Clapp*, 40 N. Y. 328. If a third person, on examination, deny his indebtedness to the judgment debtor, the power of the court is at an end, except to forbid him to transfer any interest until the appointment of a receiver. The party cannot be compelled to make a more particular and specific answer. *Tompkins Co. Bank v. Trapp*, 21 How. 17. The defendant cannot be compelled to subscribe his name to the referee's minutes of his testimony if they contain a statement which is not strictly true, even though its falsity be shown by a supplementary entry in the minutes. If incorrect, the defendant is entitled to have them corrected to conform to his testimony. *Sherwood v. Dolan*, 14 Hun, 191. The referee may allow corrections to be made to the minutes after they are signed. *Corning v. Tooker*, 5 How. 16.

An examination in supplementary proceedings of a debtor who has made a general assignment need not be confined to property acquired since the assignment. It may include an inquiry concerning his property, legal or equitable, including property transferred to another with apparent intent to hinder, delay, or defraud creditors. *Schigman v. Wallach*, 16 Abb. N. C. 317; *Schneider v. Altman*, id. 312. It seems the rule is different where an action has been brought to set aside the assignment.

Art. 9. Hearing Before Judge or Referee.

Schloss v. Wallach, 16 Abb. N. C. 319, n.; *Bacon v. Goldsmith*, 1 City Ct. 462. And if the examining creditor has recognized the assignment, by proving his claim against the debtor, he cannot examine as to matters prior to the assignment. *Wilson Bro. Co. v. Daggett*, 9 Civ. Pro. 408. On an examination in supplementary proceedings, the creditor is not deprived of his right to a complete discovery of the facts by a claim of a witness that he is the owner, by purchase, of the property sought to be reached. The creditor may still show, if possible, that the purchase was not made in good faith. *Mechanics' and T. Bank v. Healy*, 14 Week. Dig. 129, affirmed, 89 N. Y. 605. It is not necessary to swear the debtor or witness a second time on an adjourned examination. *Hudson v. Plets*, 11 Paige, 180. The power of the referee to examine further is spent on making his report. *Orr's Case*, 2 Abb. 457. But a judge has power to compel a further examination even after a receiver is appointed. *People v. Mead*, 29 How. 360. It is no ground for staying supplementary proceedings that a creditor's bill is pending between the parties. The debtor may be inquired of as to the sources whence he acquired his property. *Forbes v. Willard*, 54 Barb. 520. In proceedings against a third party, the question of rights of the parties cannot be determined. *Dickinson v. Onderdonk*, 18 Hun, 479. But the inquiry extends to all property in the hands of such third party. *Brown v. Morgan*, 3 Edw. Ch. 278. An attorney will not be compelled to disclose information he has obtained from a judgment debtor in his professional capacity. *Graham v. People*, 63 Barb. 483; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 598; *Bacon v. Frisbie*, 80 N. Y. 394. A party or witness may be required to produce books and papers on the hearing. *Pruden v. Tallman*, 6 Civ. Pro. 360; *Holmes et al. v. Stietz*, id. 362; *Champlin v. Stoddard*, 17 Week. Dig. 76; *Bacon v. Frisbie*, 80 N. Y. 394. A subpœna in supplementary proceedings before a referee must be issued under the hand of the referee. *People v. Bale*, 2 Week Dig. 275. It is said, in *Knowles v. DeLazare*, 8 Civ. Pro. 386, distinguishing *People v. Dutcher*, 3 Abb. (N. S.) 157, that a witness should be subpœnaed to attend in supplementary proceedings under § 863, and a subpœna in the usual form, signed by the clerk, is insufficient. Under the provisions of § 843, a referee in supplementary proceedings has power to administer an oath to a judgment debtor. So held in overruling demurrer

Art. 10. When Warrant May be Issued.

to an indictment for perjury. *Abbott's Annual*, 1886, p. 339. The judgment debtor, by appearing and going on with examination, waives all but jurisdictional defects in the proceeding. *Utica Bank v. Buell*, 17 How. 498. A commission cannot issue out of the State to take the deposition of a witness in these proceedings. *Graham v. Colburn*, 14 How. 52; *Morrell v. Hey*, 24 id. 48. The referee has no right to adjourn the proceedings indefinitely without the consent of the debtor, but he should require plaintiff to proceed with all reasonable diligence. *Hudson v. Plats*, 11 Paige 180. The referee has power, however, the same as a master in chancery had, as a necessary incident to the examination, and he may adjourn the proceedings from time to time against the objection of the debtor. *Kaufman v. Thrasher*, 10 Hun, 438; see *Mason v. Lee*, 23 How. 466; and *Allen v. Starring*, 26 id. 57; *Ammidon v. Walcott*, 15 Abb. 314; *Reynolds v. McElhone*, 20 How. 454; *Johnson v. Tuttle*, 17 Abb. 315; *Parker v. Hunt*, 15 id. 410, n., as to adjournments and what constitutes a valid adjournment. The parties may adjourn by consent. *Squire v. Young*, 1 Bosw. 690; *People v. Oliver*, 66 Barb. 570.

ARTICLE X.

WHEN WARRANT MAY BE ISSUED. §§ 2437, 2438, 2439, 2440.

§ 2437. Warrant of arrest instead of order.

Upon proof entitling a judgment creditor to an order, under either of the last two sections; and also proof, by affidavit, to the satisfaction of the judge, that there is danger that the judgment debtor will leave the State, or conceal himself, and that there is reason to believe that he has property, which he unjustly refuses to apply to the payment of the judgment; the judge may, instead of making an order, issue a warrant under his hand, reciting the facts and requiring the sheriff of any county, where the judgment debtor may be found, to arrest him, and bring him before the same judge, or before another judge, if the case is one where the warrant must be returnable to another judge.

§ 2438. Id.; after the order has been made.

Where the facts, specified in the last section, are made to appear, as therein stated, at any time after the making of an order, requiring the judgment debtor to attend and be examined, and before the close of his examination, the judge may issue a warrant, as therein prescribed; and, if necessary, may direct the adjournment, or, if the return day of the order has elapsed, the continuance of the proceedings under the order, until after the return of the warrant, and his decision thereupon.

§ 2439. Warrant; how vacated, etc.

A warrant, issued as prescribed in the last two sections, may be vacated or modified, as prescribed in § 2433 of this act, with respect to an order.

Art. 10. When Warrant May be Issued.

§ 2440. Undertaking may be required, etc.

Where a judgment debtor has been arrested and brought before a judge, by virtue of a warrant, issued as prescribed in this article; and it appears to the satisfaction of the judge, from his examination, or other proof, that there is danger that he will leave the State, or conceal himself, and that he has property, which he has unjustly refused to apply to the satisfaction of the judgment; the judge **may make an order**, requiring him to give an undertaking, with one or more sureties, **in a sum fixed** and within a time specified in the order, to the effect, that he will, **from time to time**, as the judge directs, attend before the judge, or before a referee, appointed or to be appointed in the proceedings; and that he will not, until discharged from arrest by virtue of the warrant, dispose of any of his property, which is not exempted from seizure by § 2463 of this act. If he fails to comply with the order, the judge must forthwith, by warrant, commit him to prison, there to remain until the close of the examination, or the giving of the required undertaking; except that the judge may direct the sheriff to produce him, from time to time, as required in the course of the proceedings.

Co. Proc., part of § 292, sub. 4, am'd.

A warrant of arrest under § 2437 may issue against a non-resident debtor. *Denning v. Schieffelin*, 26 St. Rep. 96, 7 Supp. 98. The warrant issued under this section is independent of the order for the examination of the judgment debtor, and is not affected by the fact that such order is vacated. *Frost v. Craig*, 18 Civ. Pro. 296, 30 St. Rep. 848, 16 Daly, 107, 9 Supp. 528.

This remedy may be had by the assignee of a judgment. *King v. Kirby*, 28 Barb. 49. It is necessary for the creditor, before he is entitled to a warrant of arrest against a debtor, to establish, to the satisfaction of the judge to whom the application for the warrant is presented, by affidavit, that there is danger the judgment debtor will leave the State or conceal himself, and there is reason to believe that he has property which he unjustly refuses to apply to the payment of the judgment. Where the allegations in the affidavit on which the warrant is asked are stated to be upon belief, and the fact of defendant's having property is a mere inference of the plaintiff based upon the fact that defendant is a man of extravagant habits, etc., the affidavit is insufficient. *Netzel v. Mulford*, 59 How. 452. It is said in that case, citing the language of *The People v. Recorder of Albany*, 6 Hill, 429: In such cases, where the creditor may be his own witness for the purpose of procuring a warrant, and may choose his own time for arresting the debtor, it is not too much to require that in the first instance he should make out a plain case. Under the statute of 1831, similar in language, it was held there should be proof of the facts authorizing the issuing of the warrant, and while it need not necessarily be in the form of an

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affidavit, it must be of such a character as to furnish evidence which, in the judgment of the officer, amounts to proof of the charge. *Vredcnburgh v. Hendricks*, 17 Barb. 179; *Broadhead v. McConnell*, 3 id. 175. To make a case for arrest by reason of anticipated concealment, it must appear or be presumable that the concealment will be within this State. Where it is shown that he is out of the State it will not be granted. *Roshand v. Waring*, 1 Abb. N. C. 311.

Form for Order of Arrest.

The People of the State of New York to the Sheriff of the County of Ulster :

WHEREAS, Proof has been made to me, by affidavit, that a judgment was heretofore and on the 25th day of March, 1886, rendered by the Supreme Court upon personal service of the summons in favor of Harrison Snyder and against Solomon Bates, for \$699 damages and costs, the judgment roll whereupon was duly filed in the Ulster County clerk's office on the 25th day of March, 1886, and a transcript of which judgment was duly filed and said judgment duly docketed in the Ulster County clerk's office on the 25th day of March, 1886, and that an execution has been duly issued thereupon out of the Supreme Court to the sheriff of the proper county, on the 1st day of April, 1886, and that said execution has since, and on the 26th day of June, 1886, been duly returned by said sheriff to the Ulster County clerk's office wholly unsatisfied, and that said judgment still remains wholly unsatisfied. And also upon proof by affidavit to my satisfaction that there is danger that the said Solomon Bates will leave the State of New York or conceal himself, and that there is reason to believe that he has property which he unjustly refuses to apply to the payment of said judgment, to wit: (Here recite facts as they appear in affidavit.)

You are hereby required to arrest the said Solomon Bates and to bring him before me, at, etc., on, etc., then and there to be dealt with according to law. And this shall be your warrant therefor.

Witness, etc.:

CHARLES DAVIS,
Plaintiff's Attorney.

A. B. PARKER,
Justice Supreme Court.

Form for Undertaking.

Harrison Snyder

agst.

Solomon Bates.

WHEREAS, A warrant was issued by Hon. Alton B. Parker, Justice of the Supreme Court, etc., in the above-entitled action to the sheriff

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of Ulster County, pursuant to § 2437 of the Code of Civil Procedure, requiring the said sheriff to (state requirement of warrant) ; and

WHEREAS, The said Solomon Bates had been arrested and brought before said justice ;

WHEREAS, It has appeared to the satisfaction of said judge, from the examination of said Solomon Bates, that there is danger that he will leave the State, or conceal himself, and that he has property which he has unjustly refused to apply to the satisfaction of the judgment mentioned in said warrant, and an order has thereupon been made by said judge dated July 5, 1886, requiring said Solomon Bates to give an undertaking within the time specified in said order :

Now, therefore, we, James Kline, of the city of Kingston, merchant, and George Hanley, of the town of Marbletown, merchant, do hereby jointly and severally undertake, pursuant to the said order and to the provisions of § 2440 of the Code of Civil Procedure, that said Solomon Bates will, from time to time, as the said justice directs, attend before said justice in these proceedings, and that he will not, until discharged from arrest by virtue of said warrant, dispose of any of his property which is not exempted from seizure by § 2463 of the Code of Civil Procedure.

(Add justification, acknowledgment, and approval.)

ARTICLE XI.

PAYMENT BY DEBTOR TO SHERIFF, AND PROCEEDINGS THEREON. §§ 2446, 2447, 2448, 2449, 2450.

§ 2446. Order permitting person indebted to pay debt to sheriff.

At any time after the commencement of a special proceeding, authorized by this article, and before the appointment of a receiver therein, or the extension of a receivership thereto, the judge, by whom the order or warrant was granted, or to whom it is returnable, may, in his discretion, upon proof, by affidavit, to his satisfaction, that a person or corporation is indebted to the judgment debtor, and upon such a notice, given to such persons, as he deems just, or without notice, make an order, permitting the person or corporation, to pay to a sheriff, designated in the order, a sum on account of the alleged indebtedness, not exceeding the sum which will satisfy the execution. A payment thus made is, to the extent thereof, a discharge of the indebtedness, except as against a transferee from the judgment debtor, in good faith and for a valuable consideration, of whose rights the person or corporation had actual or constructive notice, when the payment was made.

Co. Proc. § 293, am'd.

§ 2447. Order requiring delivery of money or property to sheriff or receiver.

Where it appears, from the examination or testimony taken in a special proceeding authorized by this article, that the judgment debtor has, in his possession or under his control, money or other personal property, belonging to him ; or that one or more articles of personal property, capable of delivery, his right to the possession whereof is not substantially disputed, are in the possession or under the control of another person ; the judge, by whom the order or warrant was granted, or to whom it is returnable, may,

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in his discretion, and upon such a notice, given to such persons, as he deems just, or without notice, make an order, directing the judgment debtor, or other person, immediately to pay the money, or deliver the articles of personal property, to a sheriff, designated in the order, unless a receiver has been appointed, or a receivership has been extended to the special proceeding, and in that case to the receiver.

Substituted for Co. Proc. § 297.

§ 2448. Duty of the sheriff.

If the sheriff, to whom money is paid, or other property is delivered, pursuant to an order made as prescribed in either of the last two sections, does not then hold an execution upon the judgment against the property of the judgment debtor, he has the same rights and powers, and is subject to the same duties and liabilities, with respect to the money or property, as if the money had been collected, or the property had been levied upon by him, by virtue of such an execution; except as otherwise prescribed in the next section.

Co. Proc. § 297.

§ 2449. [Am'd, 1892.] How money or property applied to pay the judgment.

After a receiver has been appointed, or a receivership has been extended to the special proceeding, the judge must, by order, direct the sheriff to pay the money or the proceeds of the property, deducting his fees to the receiver; or, if the case so requires, to deliver to the receiver the property in his hands. But if it appears, to the satisfaction of the judge, that an order, appointing a receiver, or extending a receivership, is not necessary, he may, by an order reciting that fact, direct the sheriff to apply the money so paid, or the proceeds of the property so delivered, upon an execution in favor of the judgment creditor, issued either before or after the payment or delivery to the sheriff; and a receiver, appointed pursuant to the provisions of this article, may, on leave of a judge having power to appoint such receiver, lease the real property that shall come into his possession for such time as shall be necessary to realize moneys sufficient to satisfy the judgment, with interest thereon and costs of the special proceeding.

Co. Proc. §§ 297 and 298; L. 1892, ch. 292.

§ 2450. Balance to be paid or delivered to judgment debtor, etc.

Where money is paid, or property is delivered, as prescribed in the last four sections, and afterwards the special proceeding is discontinued or dismissed; or the judgment is satisfied, without resorting to that money or property; or a balance of the money, or of the proceeds of the property, or a part of the property, remains in the sheriff's or the receiver's hands, after satisfying the judgment, and the costs and expenses of the special proceeding; the judge must make an order, directing the sheriff or receiver to pay the money, or deliver the property, so remaining in his hands, to the judgment debtor, or to such other person as appears to be entitled thereto, upon payment of his fees and all other sums legally chargeable against the same.

Under § 2447 the court is authorized, on the examination of a third party, to direct such person to pay over any money or property which he may have in his hands belonging to the judgment debtor, where there is no substantial dispute touching the possession or ownership of the property. *Bauer v. Betz*, 4 State

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Rep. 92. The question is whether the defendant has any property in his possession or under his control at the time of the commencement of the proceedings; to make the order without proof of ability to comply would be reviving, in another form, imprisonment for debt. *The Columbian Institute v. Cregan*, 3 State Rep. 287. The statute does not authorize the judge to order the application toward the payment, or the delivery or transfer to the receiver for such purpose, of any but personal property. *Smith v. Towner*, 3 State Rep. 363.

Where a trustee, examined under a third party order, testifies that he has in his hands an accrued income payable to the debtor, an order is proper upon notice to the judgment debtor directing the payment of the judgment out of such income. *Lawrence v. Pease*, 50 St. Rep. 851, 21 Supp. 223. The section only provides for an order "permitting" a payment to the sheriff by a person indebted to the judgment debtor, and an order directing such third party to pay is not authorized and furnishes no protection to the person making a payment pursuant thereof, such payment will be regarded as merely voluntary. *Grand Lodge Knights of Pythias v. Manhattan Savings Institution*, 12 Misc. 626, 68 St. Rep. 134, 34 Supp. 253, 25 Civ. Pro. 44.

The revisers, in reporting substantially the scheme finally adopted by their original draft, state that these sections are proposed as a substitute for §§ 293 and 297. They add the following: "The practical utility of both these sections has been so narrowed if not destroyed by the adjudications thereunder that they should no longer be suffered to remain in the statute book; for they have become more than snares into which ignorant persons may be entrapped to their serious damage by inexperienced, careless, or unscrupulous attorneys. With respect to § 293, it was held, in *Robinson v. Weeks*, 6 How. 161; *Richardson v. Ainsworth*, 20 id. 521; and *Lyman v. Cartwright*, 3 E. D. Smith, 117, that any payment made thereunder is at the risk of the person who makes it, who is not protected if the judgment debtor has parted with the demand, although he acted in good faith and without notice of the transfer. This ruling appears to proceed upon the ground that the statute uses the expression 'any person indebted to the judgment debtor,' whereas it is said that if the judgment debtor parted with the demand the person

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making the payment was then, notwithstanding his want of notice, indebted to the transferee, and not to the judgment debtor. As a similar expression is used in § 297 it would appear that the same result would follow where money was paid pursuant to an order made under that section. Still it has been held in the courts of original jurisdiction that an order made under that section protects the person who obeys it; and this ruling has been followed by the Court of Appeals to a qualified extent in *Gibson v. Haggerty*, 37 N. Y. 555. But the prevailing opinion in the latter case condemned, in forcible language, the character of the proceedings then under review; and, inasmuch as the more recent decisions of the same court hold that under similar circumstances the judge who made the order has no power to enforce it (and perhaps, inferentially, that he has no power to make it), its effect as a protection to the person obeying it may still be regarded as an open question. The decisions referred to arose upon the much vexed question respecting the nature of the 'property' to which § 297 applies; and, apparently, the conflict of opinion has been prolonged by a disagreement upon that point between the Court of Appeals and the Commission of Appeals, for *Lynch v. Johnson*, 48 N. Y. 27, decided by the commission in September, 1871, clearly holds that § 297 applies to a debt due to the judgment debtor; while *West Side Bank v. Pugsley*, 47 N. Y. 368, decided by the court January, 1872, holds that it is confined to 'goods or specific property.' Probably the latter case, as it reflects the opinion of the permanent court, will ultimately prevail. But under this construction § 297 is of little more utility than § 293, for the property to which the court holds it is confined, can be reached by execution. The scheme which we propose to substitute for that which has, we think, resulted in a failure may not be the best, but it is, we think, practicable, and it preserves all the features of the original scheme which it is expedient to retain, and avoids the mistakes of the latter."

It will thus be seen that the adjudicated cases cannot be relied on to interpret the language of the Code as it now stands, but that by reason of the numerous changes explained at length by the commissioners, great care must be exercised by the practitioner in relying upon adjudications before the enactment of the present sections. Many of the decisions are rendered entirely

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obsolete, while the rules laid down in others are embodied in the text. Only a brief summary of the authorities will be given. It was held under the then existing provisions that the payment to a third person was no protection against a *bona fide* assignee or claimant. *Richardson v. Ainsworth*, 20 How. 521; *Robinson v. Weeks*, 6 id. 561; *Adams v. Welsh*, 43 N. Y. Super. 52; *Countryman v. Boyer*, 3 How. 386; *Huse v. Guyot*, 3 T. & C. 790; *Hall v. Olney*, 65 Barb. 27; *Bishop v. Garcia*, 14 Abb. (N. S.) 69; *Duffield v. Horton*, 73 N. Y. 218. The burden was on the party paying to show that there was a judgment. *Handley v. Greene*, 15 Barb. 601. The payment was regarded as money paid to the use of the judgment debtor, and could be set up as a counterclaim. *Calkins v. Packer*, 21 Barb. 275. The payment was said to be valid, although no notice was given to the judgment debtor. *Gibson v. Haggerty*, 37 N. Y. 555. It was held, in *Lynch v. Johnson*, 48 id. 27, that payment or liability to pay in pursuance of such an order was a defence to the debtor in an action against him by his creditor, or by an assignee who is not shown to be a *bona fide* purchaser for value of the claim prior to the accruing of judgment creditor's lien by these proceedings. The provisions applied only to money due at the time of obtaining the order. *Stewart v. Foster*, 1 Hill, 505; *Potter v. Low*, 16 How. 549; *Atkinson v. Seawine*, 11 Abb. (N. S.) 384; *Caton v. Southwell*, 13 Barb. 335; *Sands v. Roberts*, 8 Abb. 343. It does not apply to a right of action for a tort or even a verdict therefor. *Davenport v. Ludlow*, 4 How. 337; *Ten Broeck v. Sloo*, 15 id. 28. But when judgment is perfected it may be paid to the sheriff. *Mallory v. Norton*, 21 Barb. 424. An interest in a patent may be reached under this proceeding. *Barnes v. Morgan*, 3 Hun, 703; *Gillett v. Bate*, 86 N. Y. 87. As may a dower right. *Payne v. Becker*, 87 id. 153; *Moak v. Coats*, 33 Barb. 498; *Stewart v. McMartin*, 5 id. 438. Also an estate by the curtesy. *Beamish v. Hoyt*, 2 Robt. 307. A seat in the New York Stock Exchange, or in the New York Cotton Exchange, is property, and passes to a receiver, who has a right to redeem the seat when it has been pledged by the debtor as collateral. *Rittenband v. Baggett*, 4 Abb. N. C. 67; *Sewell v. Jones*, 61 How. 54; *Grocers' Bank v. Murphy*, 10 Daly, 168; *Powell v. Waldron*, 89 N. Y. 328. Property without the State is held liable under this proceeding. *Fenner v. Sanborn*, 37 Barb. 610; *Sickels v. Hanly*, 4 Abb. N. C.

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231; see, however, *Ten Broeck v. Sloo*, 2 Abb. 234; *Ball v. Good-enough*, 37 How. 479. The alimony directed to be paid in divorce proceedings may be reached. *Stevenson v. Stevenson*, 34 Hun, 157. The proceeds of insurance on the life of a husband, after they have been deposited in bank by the wife, may be ordered paid over. *Crossby v. Stephan*, 32 Hun, 478; appeal dismissed, 97 N. Y. 606. It is said, in *Sergeant v. Bennett*, 3 How. (N. S.) 515, that moneys received by the widow of a policeman from the pension fund cannot be reached either before or after it reaches her hands. The earnings of a judgment debtor, not exempted by § 2463, can be reached. *Tripp v. Childs*, 14 Barb. 85. *Contra*, *Albright v. Kempton*, 4 Civ. Pro. 16. Whatever property can be reached by a creditor's bill can, it seems, be reached by these proceedings. *Barnes v. Morgan*, 3 Hun, 703. Salary of an officer of a municipal corporation, lying in the treasury, cannot be reached. *Waldman v. O'Donnell*, 57 How. 215; *Coleman Institute v. Cregan*, 11 Civ. Pro. 108; *Remmey v. Gedney*, 57 How. 217. Pension money is exempt from seizure. *Wildrick v. De Vinney*, 18 Week. Dig. 355; *Stockwell v. National Bank*, 36 Hun, 583; *Burgett v. Fancher*, 35 id. 647; see, however, *Younans v. Boomhower*, 3 T. & C. 21. In *Matter of Castle*, 2 N. Y. State Rep. 362, it was held that where funds were deposited by the order of the court in partition the assignee of the debtor and the receiver must try the issue as to right to the property in an action. Earnings or money acquired after service of the order cannot be reached by order. *Fischer v. Leseberg*, Abbott's Annual, 1884, p. 305. In order to ascertain whether there is a surplus arising out of trust estate an action is necessary. *Manning v. Evans*, 19 Hun, 500. Insurance moneys on household furniture cannot be reached during a reasonable time to allow the debtor to replace them. *Cooney v. Cooney*, 65 Barb. 524. After the amount necessary to satisfy the claims of the receiver have been paid the debtor is reinstated in his rights as to the property. *Lanigan v. The Mayor*, 70 N. Y. 454. The proceeding is limited to reaching property of the debtor in his possession, or in the possession of others conceded to be his. *Stewart v. Foster*, 1 Hill, 505; *Winters v. McCarthy*, 2 Abb. N. C. 357; *Peters v. Kerr*, 26 How. 3; *Hall v. McMahon*, 10 Abb. 103. Where the defendant is in possession of property which is claimed to belong to the wife the order cannot be made. *Sackett v. New-*

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ton, 10 How. 560. The judge cannot try and determine conflicting claims. *Robeson v. Ford*, 3 Edw. 441; *Stewart v. Foster*, 1 Hill, 505; *People v. King*, 9 How. 97; *Joyce v. Holbrook*, 7 Abb. 338; *Teller v. Randall*, 26 How. 155; *Rodman v. Henry*, 17 N. Y. 482. The title must be settled in an action to be brought by the receiver. *Barnard v. Kobbe*, 54 N. Y. 516; *Teller v. Randall*, 40 Barb. 242; *Locke v. Mabbett*, 2 Keyes, 457; *West Side Bank v. Pugsly*, 47 N. Y. 368. But the person claiming the property may be restrained from paying over. *Maurice v. Smith*, 5 Week. Dig. 255. The order to apply the property may be in the alternative that defendant pay over, or an attachment issue. *Crouse v. Wheeler*, 33 How. 337. A debtor who has mortgaged chattels by a mortgage payable on demand, cannot be ordered to deliver the property to a receiver. *Grizwold v. Tompkins*, 7 Daly, 214. It was held the judge could not direct property to be paid over to the creditor; that there should be a levy and sale under execution, or a receiver. *Dickinson v. Onderdonk*, 18 Hun, 479. The order for a third person to pay over should never be made where the indebtedness or its amount is either disputed or uncertain. *Sanford v. Moser*, 13 How. 137; *Alexander v. Richardson*, 7 Robt. 63; *People v. Hulburt*, 5 How. 446; *Grassmuck v. Richards*, 2 Abb. N. C. 359; *Hentz v. McKee*, 1 Law Bull. 3; *Corning v. Tooker*, 5 How. 16; *Moller v. Wells*, 29 Hun, 587. As to how far the former statute protected one who paid over under the order, see *Gibson v. Haggerty*, 37 N. Y. 555; *Lee v. Delehanty*, 25 Hun, 197; *Glenville Woolen Co. v. Ripley*, 43 N. Y. 206; *Roy v. Bucus*, 43 Barb. 310; *Waldhein v. Bender*, 36 How. 181; *Matter of Livingston*, 27 Hun, 607; *Schrauth v. Dry Dock Savings Bank*, 86 N. Y. 390; *Wright v. Cabot*, 89 id. 570. It was held, in *Adams v. Welsh*, 43 N. Y. Super. 52; *Baker v. Kentworthy*, 41 N. Y. 215, that a sheriff who received money on one execution was not authorized to apply it on another execution in his hands against the plaintiff in the former suit. On a motion for an order directing a third party to pay to the judgment creditor, it was held that there was no authority for such an application. *Birnbaum v. Thompson*, 5 Law Bull. 30.

Where a receiver has been appointed of a judgment debtor's property, and the fact is concealed, a subsequent order directing a third person to pay over money to the sheriff is irregular, al-

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though the consent of the judgment debtor to such payment was obtained. *Columbia Bank v. Ingersoll*, 21 Abb. N. C. 241. Only personal property can be required by order to be paid to the receiver of the judgment debtor in supplementary proceedings. *First National Bank of Canadaigua v. Martin*, 49 Hun, 571, 18 St. Rep. 414, 2 Supp. 315, 15 Civ. Pro. 324.

The title to the judgment debtor's real estate vests in the receiver by operation of law, and the judgment debtor is not guilty of a contempt in disobeying an order requiring him to convey land to his receiver, for the statute does not authorize a compulsory delivery by such proceedings. *First Natl. Bk. of Canadaigua v. Martin*, 49 Hun, 571, 18 St. Rep. 414, 2 Supp. 315, 15 Civ. Pro. 324 (*supra*).

A corporation may be ordered to pay the sheriff the amount of a judgment out of money due the judgment debtor under a contract, although the corporation has paid out such moneys after the service upon it of a notice of judgment against the defendant. *Burnett v. Riker*, 13 Civ. Pro. 338. Where a third person admits owing money to the judgment debtor for the erection of a house, upon which two mechanics' liens are filed, on the same day, and thereupon pays the money to the sheriff, the sheriff should not be required by order to pay the money to the judgment creditor until the termination of the lien suits. *Clark v. Gallagher*, 21 St. Rep. 314, 3 Supp. 312.

This section only authorizes a direction to pay when money is found in the hands of the judgment debtor or where articles of personal property, other than money and capable of delivery, and to which the title of the debtor is not disputed, is found in the hands of a third person. It does not warrant the direction that a third person pay over money to the sheriff or receiver. *Grand Lodge Knights of Pythias v. Manhattan Savings Institution*, 12 Misc. 626, 34 Supp. 253, 68 St. Rep. 132, 25 Civ. Pro. 44. If there is a substantial dispute as to the ownership of money in the hands of a third party, it cannot be ordered to be paid over. *Krone v. Klotz*, 3 App. Div. 587, 73 St. Rep. 719, 38 Supp. 225, 25 Civ. Pro. 320.

Where there is a dispute as to whether a third party owes the judgment debtor and where a suit is pending for the money, by a person other than the judgment debtor, a judge in supplementary proceedings cannot decide the question of such ownership,

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nor can he make an order directing the payment of such money either to the sheriff or any other person. *Waldron v. Walker*, 43 St. Rep. 605, 18 Supp. 292. If the ownership of property is disputed, and the issue raised by affidavit, an order requiring its delivery to the sheriff should not be granted, or if granted without notice should be vacated because the judge has no jurisdiction to determine the question of title or of exemption. *Servin v. Lowerre*, 3 Misc. 113, 23 Supp. 1052.

Creditors cannot reach a fund created by friends of an indigent judgment debtor for his relief and benefit. *Wilder v. Clarke*, 33 St. Rep. 143, 11 Supp. 683. Where a judgment debtor was entitled to his support and to the use of principal, under his wife's will, of which he was executor, and there has been no accounting or separation of the part necessary for his support, and where there is a serious question as to whether certain moneys belonged to the judgment debtor or to the estate, the court should not make an order applying them upon the judgment. *Wolfe v. Buttner*, 6 Misc. 119, 57 St. Rep. 861, 26 Supp. 52.

Where by will premises were given to the testator's grandchildren, after payment of a mortgage thereon from the rents and profits, and directed that the net rents and profits should go to his son, the father of such grandchildren, and the judgment debtor, for life, it was held, that a receiver in supplementary proceedings could not reach the surplus, as a trust was created for the judgment debtor during life, and that he had no interest in the surplus which the receiver could reach. *Mander v. Low*, 12 Misc. 316, 33 Supp. 719, 67 St. Rep. 544; *S. C. Mander v. Cromwell*, 24 Civ. Pro. 368.

Where the debtor has assigned or mortgaged a liquor license, and the same was not fraudulent or without consideration, he cannot be required to assign the same to the receiver. *Matter of Mayor Brewing Co. v. Rizzo*, 13 Misc. 336, 68 St. Rep. 361, 34 Supp. 457. It is the duty of the creditor to proceed against real estate owned by a judgment debtor by execution, and the court cannot compel the debtor to convey his real property to a receiver in supplementary proceedings. *Moyer v. Moyer*, 7 App. Div. 523, 40 Supp. 258. The order directing the delivery of personal property to the sheriff may be made without notice. *Serven v. Lowerre*, 3 Misc. 113, 23 Supp. 1052.

Where the debtor on examination acknowledges that he has

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cash in his possession and at his disposal, an order for him to pay it over is properly made. It must appear affirmatively that it is money earned within 60 days, in order to entitle him to the exemption of § 2463. *Matter of Van Ness*, 21 Misc. 249. Where there is a substantial dispute as to the ownership of funds between rival claimants, the court cannot decide such dispute in supplementary proceedings, but should leave the parties to their action. *Maas v. McEntegart*, 20 Misc. 676, 46 Supp. 534. A third party who has collected a debtor's salary cannot be required to pay the same over, where it does not appear from the examination of such third party that the moneys were in his hands, or due to the debtor at the commencement of the proceedings. *Gray v. Ashley*, 24 Misc. 396, 53 Supp. 547. The payment by a third party can only be required to be made to the sheriff or receiver; it cannot be required to be made to the creditor's attorney. *Gray v. Ashley*, 24 Misc. 396, 53 Supp. 547.

ARTICLE XII.

DISMISSAL OR DISCONTINUANCE OF PROCEEDINGS. § 2454.

§ 2454. How proceedings discontinued or dismissed.

A special proceeding, instituted as prescribed in this article, may be discontinued at any time, upon such terms as justice requires, by an order of the judge, made upon the application of the judgment creditor. Where the judgment creditor unreasonably neglects or delays to proceed, or where it appears that his judgment has been satisfied, his proceedings may be dismissed, upon like terms, by a like order, made upon the application of the judgment debtor, or of the plaintiff in a judgment creditor's action against the debtor, or of a judgment creditor who has instituted either of the special proceedings authorized by this article. Where an order appointing a receiver, or extending a receivership, has been made, in the course of the special proceeding, notice of the application for an order specified in this section must be given, in such a manner as the judge deems proper, to all persons interested in the receivership, as far as they can conveniently be ascertained.

This provision is new, and renders obsolete most of the cases with reference to abandonment or discontinuance. It was held, in *Squire v. Young*, 1 Bosw. 690, that where the creditor designedly omits to attend on any day to which the proceedings are adjourned the proceedings may be regarded as abandoned; and in *Thomas v. Kircher*, 15 Abb. (N. S.) 342, that no order for that purpose is necessary. See, also, *Bennett v. McGuire*, 58 Barb. 625; *Schanck v. Conover*, 56 How. 437; *Gaylord v. Jones*, 7 Hun, 480. And it was said, in *Carter v. Clarke*, 7 Robt. 490, and *Ammidon v. Walcott*, 15 Abb. 314, that unless the proceedings

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are regularly continued from day to day jurisdiction is lost. But that the error is waived by the subsequent appearance of the debtor. *Hawes v. Barr*, 7 Robt. 452. To the contrary, as to loss of jurisdiction, is *Underwood v. Sutcliffe*, 10 Hun, 453; reversed on another point, 77 N. Y. 58. In proceedings before a referee a discontinuance should not be had before report made, and should be on notice. *Kennedy v. Norcott*, 54 How. 87.

Where a debtor in supplementary proceedings sets up a discharge under the Two-Thirds Act, the court cannot take proof as to alleged fraudulent proceedings in the obtaining of such discharge and the proceedings should be set aside and the order of examination vacated. *Robens v. Sweet*, 48 Hun, 436. If an order in supplementary proceedings is made pending the issuance of a second execution upon the same judgment, the proceedings will be dismissed pending the levy. The institution of supplementary proceedings does not prevent the issuing of another execution. *Steinhart v. Michalda*, 15 Civ. Pro. 323. The provisions of § 772 of the Code Civil Procedure, permitting a judge in particular instances to vacate previous orders granted by him, without notice, does not apply to supplementary proceedings. *Dorsey v. Cummings*, 48 Hun, 76.

The testimony in supplementary proceedings is a record of the court, and the judgment debtor may require the judgment creditor to file it. *Renner v. Meyer*, 22 Abb. N. C. 438, 6 Supp. 535. Where on a motion to set aside order for examination in aid of execution upon a judgment which has been assigned, the debtor's affidavit shows that it is in aid of the assignee's action to cancel conveyances alleged to be fraudulent, such affidavit does not uphold the claim that the proceedings were not authorized by the assignee of the judgment. *Schnitzer v. Wilner*, 7 Misc. 497, 58 St. Rep. 45, 27 Supp. 970. In these proceedings the judgment of a justice of the police may be attacked for want of jurisdiction, owing to the fact that the defendant was sued by the wrong name, and that the justice amended the summons. *McGill v. Weill*, 10 Supp. 246, 19 Civ. Pro. 43.

Proceedings are not ended by mere delay, so far as the appointment of a receiver is concerned, unless the delay be for so long a period as to justify the belief that they had been abandoned. *Barnett v. Moore*, 20 Misc. 518, 46 Supp. 668. The proceedings will be deemed to be abandoned for a failure to rein-

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state a hearing or apply for a receivership for nearly four years. *Myers v. Herbert*, 64 Hun. 200, 45 St. Rep. 626, 19 Supp. 132, 22 Civ. Pro. 216; see 139 N. Y. 609, 54 St. Rep. 929. In order to discontinue supplementary proceedings an order is necessary. *Walter v. Picare*, 32 St. Rep. 841, 11 Supp. 146.

ARTICLE XIII.

COSTS. §§ 2455, 2456.

§ 2455. Costs to judgment creditor.

The judge may make an order allowing to the judgment creditor a fixed sum, as costs, consisting of his witnesses' fees and other disbursements, and of a sum, in addition thereto, not exceeding thirty dollars; and directing the payment thereof out of any money which has come, or may come, to the hands of the receiver, or of the sheriff; or, within a time specified in the order, by the judgment debtor, or other person against whom the special proceeding is instituted.

Co. Proc. § 301, in part, am'd.

§ 2456. Id.; to judgment debtor, etc.

Where the judgment debtor, or other person against whom the special proceeding is instituted, has been examined, and property, applicable to the payment of the judgment, has not been discovered in the course of the special proceeding, the judge may make an order, allowing him a like sum as costs; and directing the payment thereof, within a time specified in the order, by the judgment creditor; or, except where it is allowed to the judgment debtor, out of any money which has come, or may come, to the hands of the receiver or of the sheriff.

Id. § 301, in part, am'd.

The judge may direct payment of the costs out of any property found applicable to the payment of the debt. *Kearney's Case*, 22 How. 309. And the judge has power to make the orders for costs, up to the making of the final order applying the funds in the hands of the receiver. *Webber v. Hobbie*, 13 How. 282. The order cannot properly be made until the termination of the proceeding. *Davis v. Turner*, 4 How. 190. In practice the order for costs is embodied in the order appointing a receiver. It does not affect the order that the costs are termed counsel fee. *Hulsaver v. Niles*, 11 How. 446. Fees paid to a stenographer and for preparation of maps are not taxable. *Provost v. Farrell*, 13 Hun, 303. If, on a reference in supplementary proceedings, the creditor is unsuccessful, and fails to establish the existence of any property on an allegation by which he obtained the order, he cannot be allowed costs. *Boelger v. Swivel*, 1 How. (N. S.) 372, citing *Winters v. McCarthy*, 2 Abb. N. C. 357; *Peters v. Kerr*, 22 How. 3; *Hall v. McMahon*, 10 Abb. 103. The costs allowed

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are not motion costs, but the final costs of the special proceeding. The establishment of a method of collection impliedly prohibits their collection in any other way. No execution can be issued therefor. *Valiente v. Byran*, 3 Civ. Pro. 358. Conceding that costs in supplementary proceedings should be adjusted by the court, they are sufficiently so adjusted when first taxed by the clerk, and the court orders them readjusted. *Foley v. Rathbone*, 12 Hun, 589. Until an allowance of costs has been made in supplementary proceedings, the judgment creditor's attorney has no lien for costs. *Patterson Bros. v. Goorley*, 14 Misc. 56, 69 St. Rep. 651, 35 Supp. 297. An order under this section directing payment of costs and disbursements may be made without notice. *Serven v. Lowerre*, 3 Misc. 113, 25 Supp. 1052. The provision of § 3279 of the Code, which makes enactments concerning security for costs applicable to special proceedings, does not apply to supplementary proceedings. *First National Bank of Newville v. Yates*, 21 Misc. 373, 47 Supp. 484.

Even if upon the institution of supplementary proceedings the debtor pays the amount due, and there is no examination had, costs may still be awarded to the judgment creditor. *Colne v. Gerard*, 19 Abb. N. C. 288. Upon an examination of a third person under § 2441, costs of the proceeding may be allowed against the judgment debtor. *Grinnell v. Sherman*, 33 St. Rep. 27, 11 Supp. 682.

Upon dismissing proceedings against a debtor upon the ground that the affidavit upon which the order was based is defective, the court may impose costs upon the creditor. The limitation of §§ 2455 and 2456 relates only to costs in the proceeding. *Hulson v. Weld*, 38 Hun, 142. But this section does not provide for the award of costs to a debtor without an examination. *Simms v. Frier*, 2 Law Bull. 97. Where defendant is awarded costs because no property was found, he cannot be charged with fees of stenographer and witnesses, although allowed credit on the judgment therefor. *Boelger v. Swivel*, 1 How. (N. S.) 372. Where a receiver brought an unsuccessful action, an order compelling a person to pay costs as one beneficially interested in the recovery, cannot be made until after judgment against the plaintiff for costs has been perfected. *Fredericks v. Niver*, 28 Hun, 417. A third person was held entitled to costs where the proceedings had been long and no property discovered. *Anonymous*, 11 Abb. 108; also

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Anonymous, 3 Sandf. 725; also in *Sloane v. Higgins*, 2 Law Bull. 11. But, as a general rule, it is held that the creditor is entitled to once examine the debtor without liability for costs.

ARTICLE XIV.

CONTEMPT IN SUPPLEMENTARY PROCEEDINGS. § 2457.

§ 2457. Disobedience to order; how punished.

A person who refuses, or without sufficient excuse neglects, to obey an order of a judge or referee, made pursuant to the last two sections, or to any other provision of this article, and duly served upon him, or an oral direction, given directly to him by a judge or referee, in the course of the special proceeding; or to attend before a judge or referee, according to the command of a subpoena, duly served upon him; may be punished by the judge or by the court out of which the execution was issued, as for a contempt.

This section settles a somewhat controverted question as to whether the judge or the court should exercise the power to punish for contempt. That the judge had full power was held in *Shepherd v. Dean*, 13 How. 173; *In re Smethurst*, 4 id. 369; *Lathrop v. Clapp*, 40 N. Y. 328. Also when sitting at Special Term. *Dresser v. Van Pelt*, 15 How. 19; *People ex rel. v. Kelly*, 22 id. 309. The attachment should be made returnable before the judge before whom it was issued, and not before one of the judges at chambers, but an error in this respect makes it only voidable and is waived by giving a bond. *Kelly v. McCormick*, 28 N. Y. 318. Such proceedings, pending before a county judge, do not abate upon the expiration of his term of office, and may be continued before his successor. *Holstein v. Rice*, 24 How. 135. In an action in the Supreme Court the power to punish for a contempt is not vested exclusively in the county judge before whom the proceedings are pending; the Supreme Court has concurrent jurisdiction. *Tremain v. Richardson*, 68 N. Y. 617. A judgment debtor may be punished for contempt in not appearing pursuant to an order; although he was not served with summons in the original action, the question cannot be raised in this proceeding. *Keller v. Zeigler*, 5 Law Bull. 15. So where a partner was not served in an action to reach the joint property of the firm. *Perkins v. Kendall*, 3 Civ. Pro. 240. So where the referee fixes the time and place of hearing, pursuant to order of the court, and the debtor fails to appear. *Redmond v. Goldsmith*, 2 Law Bull. 19. A person interfering with the possession of a receiver is liable to punishment for contempt. *People's Bank v.*

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Moody, 1 Law Bull. 52. Where a person appears and answers without objection, he waives all except jurisdictional defects, and may be punished if he disobeys the order of the court. *Matter of Johns*, 1 Law Bull. 76; *Lehmaier v. Griswold*, 46 N. Y. Super. 11. But a defendant sued by a wrong name will not be considered in contempt for failing to comply with an order where his name is erroneously stated, both in the judgment and order, although he is the real person intended. *Muldoon v. Pierz*, 1 Abb. N. C. 309.

The irregularity of an order is no excuse for a debtor refusing to appear and answer, and he will be punished for contempt though the order be afterward set aside for irregularity. *Shultz v. Andrews*, 54 How. 378; but see *Hancock v. Sears*, 93 N. Y. 79. A debtor must obey the order even though not originally served with summons. *Keller v. Zeigler*, 5 Law Bull. 15; *Perkins v. Kendall*, 3 Civ. Pro. 240. The debtor is bound to obey the order of a referee as to adjournments, and will be guilty of contempt if he refuses. *Redmond v. Goldsmith*, 2 Law Bull. 19. A third person will not be punished for contempt for not appearing where the allegations as to property in his possession were on information and belief. *Day v. Lee*, 52 How. 95. And so as to a third person if execution had not been returned unsatisfied. *Sloane v. Higgins*, 1 Law Bull. 59. It is a contempt for the debtor to refuse to answer a question held proper by the referee, and which he is directed to answer. *Lathrop v. Clapp*, 40 N. Y. 328. To put a judgment debtor in contempt for interfering with his property, it must affirmatively appear that the property in question was acquired prior to the granting of the order. *Potter v. Low*, 16 How. 549. A transfer of property in payment of counsel fees is a contempt. *Deposit National Bank v. Wickham*, 44 How. 421. As is a payment of rent. *Aschemorr v. Emont*, 6 Law Bull. 81. To draw money deposited in the name of the debtor as trustee, after service of an injunction, even though it is the property of his wife. *People v. Kingsland*, 3 Keyes, 325. But in *Dean v. Hyatt*, 5 Week. Dig. 67, it is held the legal title to the property, the transfer of which constitutes the contempt, must have been in the debtor. Where an order has been made to pay over, which it is shown ought not to have been made, a party will not be punished for disobedience if there was no disrespect. *Beebe v. Kenyon*, 3 Hun, 73.

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The act of a judgment debtor, who has been served with an injunction order in supplementary proceedings in withdrawing from a savings bank money deposited in his name for trust for another, constitutes a contempt of court. *Jackson v. Murray*, 25 App. Div. 140, 49 Supp. 195, 83 St. Rep. 195. Where the judgment debtor transfers as attorney-in-fact for his fraudulent grantee property already transferred by the grantee to the same person, it is a technical contempt of a provision of the injunction restraining the debtor or the grantee from interfering with their property, but does not justify a finding that the judgment creditor was damaged in the amount of the judgment, as the vendee's title and possession were rendered absolute by the first transfer. *Diffany v. Risley*, 23 App. Div. 371, 48 Supp. 283, 82 St. Rep. 283. A judgment of the municipal court of Syracuse for less than \$25 is not made a lien on real estate by § 16 of chapter 342, Laws 1892, and cannot be made the basis of supplementary proceedings, and therefore the judgment debtor is not punishable for contempt in refusing to appear for examination. *Andrews v. Mastin*, 22 Misc. 263, 49 Supp. 1118, 83 St. Rep. 1118. A judgment debtor who, after surrendering the possession of his property to a receiver thereof, interferes with the receiver's possession, is guilty of a contempt of court. *Sinberg v. Winberg*, 25 Misc. 327. A judgment creditor cannot be punished for contempt in supplementary proceedings when it does not appear that the order appointing receiver has been filed in the county clerk's office. *Barcither v. Brosche*, 19 Civ. Pro. 446.

It is no excuse for a debtor's non-appearance that the order is irregular; he should appear and move to set it aside. *Shults v. Andrews*, 54 How. 378. But if it appears that the execution on the judgment was not returned unsatisfied, a motion to punish for contempt for not appearing was set aside. *Sloane v. Higgins*, 1 Law Bull. 59. If, on the return of the order to show cause, the party appears and submits to an examination, the court proceeds no further with the contempt. *Hilton v. Patterson*, 18 Abb. 245. A debtor failing to appear on a return day fixed simply by parol between the creditors' counsel, the debtor, and the referee, may be punished for a contempt for failure to appear. *People v. Oliver*, 66 Barb. 570. If seems, under *Miller v. Adams*, 52 N. Y. 409, that the judge may take judicial notice of the failure of the debtor to appear before him so as to base pro-

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ceedings thereon. It is no excuse for non-appearance that the debtor, subsequent to the service of the order, filed a petition in bankruptcy. *Spaid v. Hoge*, 1 Week. Dig. 24. The fact that the referee is hostile to the debtor does not excuse his non-appearance; he should apply to the judge to vacate or modify the order. *Tremain v. Richardson*, 68 N. Y. 617. Upon finding a party guilty of contempt for not appearing, the judge has no authority to impose a fine equal to the amount of the judgment, but he should impose a fine sufficient to pay costs and expenses, and order the defendant to appear for examination. *Reynolds v. Gilchrist*, 9 Hun, 203. On motion to punish for contempt for not appearing, the certificate of the referee is not legal evidence of the failure to appear; an affidavit proving the facts charged is necessary. *Rhineland v. Dunham*, 2 Civ. Pro. 32. When the judgment debtor is shown to have been a member of a firm, and his co-partners refused to state the amount received by the judgment debtor from the business, and whether the books of the firm were under his control, it was held that the committal of such partner was proper. *People v. Marston*, 18 Abb. 257. When a referee, on an examination before him, directs a witness to answer, it is a sufficient order, and the question being proper, if the witness refuse to answer, he is guilty of a contempt. *Lathrop v. Clapp*, 40 N. Y. 328. To support a conviction for contempt for transferring property, the legal title to the property disposed of must have been in the accused. *Dean v. Hyatt*, 5 Week. Dig. 67. And it must have been acquired prior to the granting of the order. *Potter v. Low*, 16 How. 549. Transfer of property to his attorney is a violation of the injunction. *Deposit National Bank v. Wickham*, 44 How. 421. As is payment of rent of a place of business and residence. *Aschemorr v. Enmont*, 6 Law Bull. 81. But not to proceed to judgment in a pending suit. *Parker v. Wakeman*, 10 Paige, 485; see *People ex rel. Morris v. Randall*, 73 N. Y. 416. A debtor is not guilty of contempt in applying his earnings for services withing sixty days of the commencement of the proceedings to the support of his family. The debtor need not procure the order of a judge before making the application. *Hancock v. Scars*, 93 N. Y. 79, reversing 29 Hun, 96, and overruling *Newell v. Cutler*, 19 id. 74. Refusal to surrender possession of property is not contempt, unless the order not only required a conveyance but also delivery of the posses-

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sion. *Tinkev v. Langdon*, 60 How. 180. Nor will he be compelled to deliver possession of personal property to a receiver where it is covered by a chattel mortgage which, at the date of the receiver's appointment, is past due. *Tinkev v. Langdon*, 13 Week. Dig. 384. Where a debtor, on examination, admitted his indebtedness, and an order was made for him to pay the judgment, and he afterward ascertained that it had been assigned, it was held he should not be punished for contempt in disobeying the order, but that the order should be vacated, and that the validity of the assignment could not be questioned except by a receiver. *Beebe v. Kenyon*, 3 Hun, 73.

Where the direction is to pay the judgment the debtor is not bound to pay the receiver. *People ex rel. v. King*, 9 How. 97; *Watson v. Fitzsimmons*, 5 Duer, 629. The property must be shown to be under the control of the party directed to deliver it. *Tinker v. Crooks*, 22 Hun, 579; *Richie v. Bedell*, 22 Week. Dig. 563. The judgment debtor was a resident of Pennsylvania, and and was required, by an order in supplementary proceedings, to deliver to the sheriff certain moneys paid to him as wages after service of the order, which money, it appears, was in Pennsylvania. *Held*, error; that the court had no power to compel the debtor to go out of the State to get the money; the most it could do, it seems, would be to require the debtor to transfer his title to the money to the receiver. *Buchanan v. Hunt*, 98 N. Y. 560, reversing 33 Hun, 329. Where the debtor is ordered to pay the debt, and a specified sum for costs within a specified time, on his failure to do so he may be proceeded against as for a contempt, and imprisoned until the order be complied with. *Brush v. Lee*, 6 Abb. (N. S.) 50. But payment of a debt due a judgment debtor from a third person cannot be compelled by means of contempt proceedings. *West Side Bank v. Pugsley*, 47 N. Y. 368. Upon the appearance of a debtor pursuant to an order for his examination, he admitted that he had in his possession money and property sufficient to satisfy the judgment, and requested an adjournment to enable him to apply it on the judgment. The judge made an order reciting the facts, and giving him until a day named to pay the judgment, and providing in default thereof that he be adjudged guilty of a wilful contempt. It further ordered that in such case he pay a fine and be imprisoned until the payment thereof, and ordered a commitment issue to

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carry this judgment into effect. *Held*, that the defendant could only be convicted of a contempt upon the return of an attachment or an order to show cause, and that the court could not thus simultaneously make an order and declare the consequences of a disobedience to it. *Tinker v. Cook*, 22 Hun, 579. Where the defendant failed to appear upon an order for his examination he was fined \$500, and committed without bail in default of payment. *Waters v. Miller*, 3 Law Bull. 101. A fine to the full amount of the judgment on failure to appear is excessive: it should be only such sum as will reimburse the creditor for costs and expenses. *Reynolds v. Gilchrist*, 9 Hun, 203. A judgment debtor is not in contempt for disobeying an order directing the assignment and conveyance of land without the State. *Smith v. Tozer*, 3 St. Rep. 263. The costs on reversal of an order directing a commitment for contempt in supplementary proceedings are but \$10 costs and disbursements. *Jones v. Sherman*, 8 St. Rep. 344. The proceedings on contempt are fully discussed under that title under § 2266 *et seq.*, and reference is made to the cases cited and procedure there detailed for the practice in full in all cases of contempt. The forms there given can be readily adapted to contempt under these proceedings, and it is, therefore, deemed unnecessary to multiply precedents.

The special surrogate who issued the original order in supplementary proceedings has power to punish as for a contempt the defendant disobeying it. *Aldrich v. Davis*, 64 Hun, 636, 46 St. Rep. 587, 19 Supp. 765. As a receiver's order is not complete until the order appointing him has been filed, the judgment debtor cannot be punished for contempt in not obeying a direction in such order, unless the same be filed. *Barcither v. Brosche*, 13 Supp. 561, 19 Civ. Pro. 446. A provision in an order adjudging a judgment debtor in contempt for disobeying an injunction which requires him to obtain a reassignment of rights transferred prior to judgment is unauthorized. *Meyer v. Drey-spring*, 5 Misc. 560, 52 St. Rep. 520, 32 Supp. 315. When proceedings are once dismissed, the court cannot punish for contempt unless the proceedings are revived for irregularity in the dismissal. *Wolfe v. Knight*, 15 Misc. 438, 72 St. Rep. 790, 37 Supp. 210.

After the service of an order in supplementary proceedings containing an injunction, the payment of moneys by the

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judgment debtor, or the execution or delivery of a general assignment, is a contempt of court, although a receiver of his property had previously been appointed. *National Wall Paper Co. v. Gerlach*, 15 Misc. 640, 72 St. Rep. 678, 37 Supp. 428. As to when a judgment debtor was punished for contempt in transferring insurance money received on his brother's life after service of the order, see *Walter v. Pecare*, 32 St. Rep. 841, 11 Supp. 146. The exemption of money earned within 60 days, as provided by § 2463, does not apply to earnings which arise in buying and selling merchandise, and therefore a debtor served with an injunction order is guilty of contempt if he pay to dealers who have supplied him with goods the moneys collected on accounts accruing within sixty days before the proceedings were brought. *Mulford v. Gibbs*, 9 App. Div. 490, 41 Supp. 273.

A debtor is guilty of contempt where, after service of the order in supplementary proceedings, he deposited money loaned to him for the payment of his debts in a bank and paid the same out by check in settlement of said debts. *Rainsford v. Temple*, 2 Misc. 454, 51 St. Rep. 144, 21 Supp. 1037. It is a violation of the injunction order to make a general assignment with preferences. *Canda v. Golliner*, 73 Hun, 493. The refusal by the debtor to answer a question in supplementary proceedings where he has been orally directed to do so by the referee makes him liable to punishment for contempt, and a written order of the referee is not necessary. *Kendrick v. Wandall*, 88 Hun, 518, 69 St. Rep. 53, 34 Supp. 976. It is a contempt for the debtor to interfere and prevent his tenants from paying rent to the receiver, and in preventing the receiver from entering the premises. *Vermont Marble Works v. Wilkes*, 62 St. Rep. 121, 30 Supp. 381. It is not a contempt for a debtor who, before the issuing of an execution against him, had assigned to his wife all his right in an insurance policy on his father's life, if, after the order in supplementary proceedings, he deposits a check received for his share of such policy to his wife's credit. *Rhodes v. Linderman*, 43 St. Rep. 520, 17 Supp. 628.

Where a person having a diamond ring of the debtor under a parol mortgage, told the debtor that she must get some one to take the property off his hands after the service of an injunction order upon her, and she procured another person to do this who took a new mortgage for a sum less than the old one, it was held

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that there was no violation of the order. *Duffus v. Cole*, 39 St. Rep. 838, 15 Supp. 370. If supplementary proceedings have been apparently abandoned and the debtor has become destitute, it is not contempt for her to sell her jewelry. *Meyers v. Herbert*, 64 Hun, 200, 45 St. Rep. 626, 19 Supp. 132, 22 Civ. Proc. 216; see 139 N. Y. 609, 54 St. Rep. 929. Where one had given checks in good faith before the service of the injunction order, he is not bound to stop the payment on such checks. *Fitzgibbons v. Smith*, 41 St. Rep. 670, 16 Supp. 410.

Where the title of property is in dispute, an order adjudging the defendant in contempt for refusing to deliver the same to a receiver is void. *Gallagher v. O'Neil*, 3 Supp. 126, 21 St. Rep. 161. A member of the legislature cannot be punished for a disobedience of an order requiring him to appear for examination in supplementary proceedings during a session of the legislature; such order should not be granted and will be vacated, if issued, as improvidently granted. *Everard v. Brennan*, 2 City Ct. 351. Where the amount of a judgment debtor's interest in an estate, which he has assigned in violation of the injunction order, cannot be definitely fixed, the court can only impose a fine of \$250 and costs for such violation. *Wynkoop v. Myers*, 26 St. Rep. 81, 7 Supp. 898, 17 Civ. Pro. 443. Where the violation of the injunction was in the parting with the sum of \$90, it was held that the fine should not exceed such sum. *Myers v. Dreyspring*, 5 Misc. 560, 52 St. Rep. 520, 32 Supp. 315.

If the debtor is in contempt for failing to appear for examination, he cannot be fined the entire amount of the judgment, but only the amount of the costs of the proceeding, and should also be imprisoned until he pays the same and submits to the examination. *DeWitt v. Gunn*, 68 St. Rep. 790, 34 Supp. 879, 24 Civ. Pro. 406. A precept for commitment for contempt cannot be issued until there has been an adjudication that there is a contempt and that the creditor has been injured. *Blake v. Bolte*, 10 Misc. 333, 63 St. Rep. 408, 31 Supp. 124, 24 Civ. Pro. 166. An order adjudging the debtor in contempt is fatally defective, if it does not determine that the misconduct complained of defeated, impaired, impeded, or prejudiced the right or remedy of the creditor. *Wolf v. Buttner*, 6 Misc. 119, 57 St. Rep. 861, 26 Supp. 52. Where there was a commitment for contempt adjudging the debtor guilty of the same, and that such contempt

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had impaired, impeded, and prejudiced the rights and remedies of the plaintiff, and imposed a fine, and directed a commitment to jail until the same was paid with costs, and also providing in the alternative, that if the defendant appeared on a fixed day for examination, and paid a certain sum as fine, and stipulated not to bring an action for damages because of the contempt proceedings, then he should be purged from commitment and discharged; it was held that even if the court had no power to make the alternative provision in the order and commitment, that it did not harm the judgment debtor, because he could relieve himself from imprisonment by complying with the first part of the order, which part the court had power to make. *People ex rel. O'Connor v. Sickles*, 59 Hun, 342, 36 St. Rep. 548, 13 Supp. 101.

Unless the court would have power to make an order requiring the debtor to pay over money in his hands to satisfy the judgment, it would have no power to issue an attachment for contempt in disposing of such moneys in violation of the injunction order. *Gerton Carriage Co. v. Richardson*, 6 Misc. 466, 59 St. Rep. 654, 27 Supp. 625. It is not a contempt for the attorney of a judgment debtor to pay to his wife the recovery in an action in which the debtor was plaintiff when the same was assigned to her before the service of the injunction order. *Matter of Duryea*, 17 App. Div. 540, 45 Supp. 703. It is no excuse for the judgment debtor's failure to appear for examination, that there was a mistake in the date of the judgment in the affidavit upon which the order was granted. *Matter of Hatfield*, 17 App. Div. 430, 45 Supp. 270. A fine of \$184.68 was held not to be excessive under § 2284 of the Code Civil Procedure, although no actual loss or injury was shown. *Matter of Hatfield*, 17 App. Div. 430, 45 Supp. 270 (*supra*).

It is a contempt for the debtor to withdraw money from a savings bank deposited in his name, in trust for another, after the service of an injunction order. *Jackson v. Murray*, 25 App. Div. 140, 49 Supp. 195. Where the debtor has been ordered to deliver a certain ring to the receiver and fails to do so, but delivers another ring of little or no value, the act is a civil contempt punishable by fine and costs of motion. *Matter of Blumenthal*, 22 Misc. 704, 50 Supp. 49; 84 St. Rep. 49.

A judgment of the municipal court of Syracuse for less than

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§25 is not made a lien on real estate by § 16 of chap. 342, Laws 1892, and cannot be made the basis for supplementary proceedings, and therefore the judgment debtor is not punishable for contempt for refusing to appear for examination. *Andrews v. Mastin*, 22 Misc. 263, 49 Supp. 1118, 83 St. Rep. 1118.

ARTICLE XV.

WHEN ARTICLE DOES NOT APPLY. § 2463.

§ 2463. [Am'd, 1886.] **Cases where this chapter is not applicable; what property cannot be reached.**

This article does not apply where the judgment debtor is a corporation created by or under the laws of the State, or a foreign corporation specified in § 1812 of this act, except in those actions or special proceedings brought by or against the people of the State. Nor does it authorize the seizure of, or other interference with, any property which is expressly exempt by law from levy and sale by virtue of an execution; or any money, thing in action, or other property, held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor; or the earnings of the judgment debtor for his personal services, rendered within sixty days, next before the institution of the special proceeding; when it is made to appear, by his oath or otherwise, that those earnings are necessary for the use of a family, wholly or partly supported by his labor. L. 1886, ch. 26.

Creditors are entitled to the debtor's earnings except for the period of sixty days, computed from the time when the motion is made to apply the property. But see language of section as to time up to which creditor is entitled as it now stands. *Bush v. White*, 12 Abb. 21; *Tripp v. Childs*, 14 Barb. 85; *Woodman v. Goodenough*, 18 Abb. 65; *Potter v. Low*, 16 How. 549; *Cummings v. Timberman*, 49 id. 36. But earnings becoming due after the service of the order cannot be reached. Cases above cited and *Ireland v. Smith*, 1 Barb. 419; *Caton v. Southwell*, 13 id. 335. A debtor having a family may always have sixty days' earnings exempt. *McCullough v. Carrogan*, 24 Hun, 157. Money or property earned after the service of the order cannot be reached. A receiver becomes vested with such property as the judgment debtor had at the time of the commencement of the proceedings. *DuBois v. Cassidy*, 75 N. Y. 298. Money or salary not yet due the debtor when the order is served cannot be reached. *First National Bank v. Beardsley*, 8 Week. Dig. 7; *Kernan v. Hill*, 1 id. 69. The proceeds of a business are not personal earnings. *Aschemorr v. Emmont*, 5 Law Bull. 80; *Whalon v. Tension*, 1 id. 22. The judgment debtor must have

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a family dependent upon him to be entitled to the exemption. *Martin v. Sherman*, 2 Hill, 586; *Van Vechten v. Hall*, 14 How. 436. The teacher of a school who is entitled to payment in advance may claim his earnings as exempt. *Miller v. Hooper*, 19 Hun, 394. A judgment recovered by a debtor for damages for sale of exempt property cannot be reached until a reasonable time has elapsed to enable him to apply the proceeds to acquiring exempt property. *Tillotson v. Wolcott*, 48 N. Y. 188. Section 1394 fixes the period of exemption at one year. This exemption should be liberally construed in favor of the debtor. *Miller v. Hooper*, *supra*. It is not necessary for the judgment debtor to bring the facts constituting exemption to the attention of the judge before applying his earnings to the support of his family. It is sufficient if he justifies the use when called on to transfer the money, and in such case he cannot be put in contempt. *Hancock v. Scars*, 93 N. Y. 79. The surplus rents and profits of trust property left for the support of a debtor cannot be reached in supplementary proceedings, but only in a suit for that purpose. *Manning v. Evans*, 19 Hun, 500. The court in such an action can determine what is a reasonable allowance, and surplus can be reached before it accrues, and the trustees are bound by the determination. *Williams v. Thorn*, 70 N. Y. 270; S. C. 81 id. 381. It is said, in *McEvoy v. Appleby*, 27 Hun, 44, that the rule laid down in the cases last cited has not been changed by § 2463. The court cannot order a judgment debtor to convey all his personal property to the receiver, where he is a householder and has a family. *Moyer v. Moyer*, 7 App. Div. 523, 40 Supp. 258.

Where exempt property has been destroyed, insurance money thereon is also exempt, and will not be directed to be paid to the receiver, even though the judgment debtor had previously expressed a willingness to apply such money to the debt, if he changes his mind before the order is applied for. *Bliss v. Raynor*, 91 Hun, 250, 72 St. Rep. 57, 36 Supp. 156. The money earned by a photographer, a married man, within 60 days before the beginning of the proceedings, is exempt, and he cannot be punished for using the same for the support of his family. *McSkiman v. Knowlton*, 20 Civ. Pro. 274, 14 Supp. 283.

The Laws of 1884, chapter 116, and Laws of 1889, chapter 520, while in force were general in their terms, and exempted

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insurance moneys from execution for the debts of the insured and his widow and children, and therefore moneys received by a widow, as a beneficiary, from a fraternal society, for insurance on her husband's life, and received while said laws were in force, is exempt from the claims both of her creditors, and from those of her deceased husband. *Matter of Lynch*, 83 Hun, 462; S. C. *Clark v. Lynch*, 31 Supp. 1038, 65 St. Rep. 68.

The exemption of earnings accrued within 60 days does not apply where such earnings arise through the business of buying and selling merchandise. *Mulford v. Gibbs*, 9 App. Div. 490, 41 Supp. 273. Supplementary proceedings may be brought against a foreign corporation, although it does no business in this State and has no agency here. *Logan v. McCall Publishing Co.*, 140 N. Y. 447, 55 St. Rep. 794, 23 Civ. Pro. 246. But this power to proceed against foreign corporations exists only against foreign corporations not specified in § 1812, Code Civ. Pro., and therefore the proceedings do not lie against a foreign corporation which has its principal place of business in this State, nor do they lie against a domestic corporation, and an order instituting proceedings against such exempt corporations is absolutely void. *Lery v. Swick Piano Co.*, 17 Misc. 145, 39 Supp. 409.

But it has been held in the New York Common Pleas, 1893, that a foreign corporation not having a place of business within this State cannot be examined in supplementary proceedings for the purpose of securing the appointment of a receiver. *Stephens v. Page*, 4 Misc. 517, 54 St. Rep. 133, 24 Supp. 698, 23 Civ. Pro. 191. The case of *Logan v. McCall Publishing Co.*, 140 N. Y. 447, cited above, holds that where the defendant is not one of the foreign corporations specified in § 1812, a proceeding lies, and that the exemption of corporations under this section (2463) is strictly construed, and the case also points out that § 2452 provides how an order for the examination may be served upon a corporation, which seems to indicate that not all corporations are exempt from examination. The court says: "The policy of the State does not preclude the creditor of such a corporation (*i. e.* not specified in § 1822) from obtaining preference upon the assets here." Supplementary proceedings cannot be brought upon a judgment recovered against executors under Code Civil Procedure, § 1822. *Collins v. Beebe*, 54 Hun, 318, 27 St. Rep. 4, 7 Supp. 442.

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If the debtor is a corporation created by the laws of this State, proceedings for the examination of a third person as to property in his possession belonging to the corporation cannot be maintained. *Fitchburg National Bank v. Bushwich Chemical Works*, 13 Civ. Pro. 155.

Railroad bonds in the hands of its agents to be negotiated for its use are not the property of the company, and therefore an order in supplementary proceedings, requiring a third person to deliver them to a receiver, as property of the judgment debtor, should be reversed. *Cunningham v. Pennsylvania, Slatington, etc., R. R. Co.*, 11 St. Rep. 663. As an agreement for the future support of a debtor in consideration for money paid is void under 3 Revised Statutes (7th ed.) 2327, § 1, such money can be reached in supplementary proceedings against the debtor. *Davis v. Briggs*, 5 Supp. 323, citing *Keller v. Paine*, 107 N. Y. 83. A watch if it be worn merely as an ornament, and only used on special occasions, may be reached in supplementary proceedings, and the fact that it is a present from the debtor's mother does not exempt it. *Peck v. Mulvihill*, 2 City Ct. 424. A foreign corporation having a place of business and agency within the State cannot be examined in supplementary proceedings, even after the appointment of a receiver in the corporation's own State, and the appointment of an ancillary receiver in this State. *Matter of Victor*, 20 Misc. 289, 45 Supp. 800, reversing 20 Misc. 13, 44 Supp. 603. Money realized by a saloon-keeper for the sale of his stock, in the regular course of business, is not earned from personal services, and the disposal thereof when the same is enjoined is a contempt. *Prince v. Brett*, 21 App. Div. 190, 47 Supp. 402. Where a judgment debtor acknowledges that he has money in his possession, it must affirmatively appear that the same was earned within sixty days to bring it within the exemption; otherwise an order requiring him to pay it over is properly made. *Matter of Van Ness*, 21 Misc. 249.

The proceedings can only reach property which the debtor had in his possession, or under his control, at the time of the order for examination, or which is actually due him at that time, and the proceedings cannot reach subsequently acquired property, or future earnings of any kind, or earnings for personal services rendered within sixty days preceding the order, if necessary for

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the use of the debtor's family. *Matter of Trustees of Board of Publication and Sabbath School Work*, 22 Misc. 645, 50 Supp. 171, 27 Civ. Pro. 109. A trustee against whom a judgment has been rendered may be examined in supplementary proceedings. *Matter of Gough*, 31 App. Div. 307, 52 Supp. 627.

ARTICLE XVI.

WITNESS NOT EXCUSED FROM ANSWERING. § 2460.

§ 2460. [Am'd, 1881.] No person excused from answering on the ground of fraud.

A party or a witness, examined in a special proceeding, authorized by this article, is not excused from answering a question, on the ground that his examination will tend to convict him of the commission of a fraud; or to prove that he has been a party or privy to, or knowing of, a conveyance, assignment, transfer, or other disposition of property for any purpose; or that he or another person claims to be entitled, as against the judgment creditor, or a receiver appointed or to be appointed in the special proceeding, to hold property, derived from or through the judgment debtor, or to be discharged from the payment of a debt which was due to the judgment debtor, or to a person in his behalf. But an answer cannot be used, as evidence against the person so answering in a criminal action or criminal proceeding.

Co. Proc. § 292, am'd.

Previous to the amendment of 1881 this section prohibited the use of the examination of a party or witness against him as evidence of fraud in any other matter. The provisions now stand, substantially as to the use of such examination in civil actions, as did the old Code, and as to the rule then, it was held in *Bush v. Preston*, 20 Week. Dig. 190, that an answer given by a party in supplementary proceedings prior to September 1, 1880, might be used in evidence against him. In *Wright v. Nostrand*, 94 N. Y. 31, where the examination was had apparently under the old Code, it was held that the evidence of the judgment debtor, in a creditor's action taken in supplementary proceedings, was admissible not only against him as an admission, but against all the defendants for the purpose of affecting his credibility by showing conflicting statements. The evidence of a party taken on supplemental proceedings is admissible under this section of the present Code. *Dusenbury v. Dusenbury*, 63 How. 351. Proceedings under the Non-Imprisonment Act are not criminal proceedings, such as would exclude the evidence of a debtor on supplemental proceedings under the old Code. *People ex rel. v. Spier*, 12 Hun, 67. In *Barber v. People*, 17 id. 366, it was held that the testimony

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of a witness in supplementary proceedings cannot be used as evidence of a fact stated by him on such examination upon a trial for a criminal offence. A judgment debtor who loses money at gambling may, on supplementary proceedings, be required to state when and where he lost his money, with the names of the winners, so that the receiver to be appointed may sue for and recover it back for the benefit of judgment creditors. The privilege of the witness in such case is removed by this section, and the protection of the law takes its place. *Steinhart v. Farrell*, 3 State Rep. 292.

The assignee of the judgment debtor must answer questions as to the debtor's disposition of his property before an assignment, and he cannot refuse on the ground that the evidence would tend to show that the debtor had made a fraudulent assignment. Code Civil Procedure, § 1914, has no application to supplementary proceedings. *Matter of Sickie*, 52 Hun, 527, 23 St. Rep. 585, 5 Supp. 703, 17 Civ. Pro. 138. Proceedings supplementary to execution are directed against property which the judgment debtor has in his possession or under his control at the time of the order for examination or which is actually due him at that time, and no property subsequently acquired or future earnings of any kind, and no earnings for personal services within 60 days preceding the order if necessary for the use of his family, can be reached. *Matter of Trustees of Bd. of Publication & Sabbath School Work*, 22 Misc. 645, 50 Supp. 171, 84 St. Rep. 171, 27 Civ. Pro. 109.

ARTICLE XVII.

HOW ORDERS VACATED, MODIFIED, OR REVIEWED. § 2433.

§ 2433. Nature of the remedies. Review of orders.

Each of those remedies is a special proceeding. But an order, made in the course thereof, can be reviewed only as follows :

1. An order, made by a judge, out of court, may be vacated or modified by the judge who made it, as if it was made in an action ; or it, or the order of the judge vacating or modifying it, may be vacated or modified, upon motion, by the court out of which the execution was issued.
2. Where the execution was issued out of a county court, an appeal from an order, made in the course of the proceedings, may be taken in like manner, as if the order was made in an action brought in the same court.

A third party order, granted under § 2441, is not within subdivision 1 of this section, and is appealable. *Levy v. Swick Piano Co.*, 17 Misc. 145, 39 Supp. 409. Where the order in supplement-

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ary proceedings is made by a judge out of court, a motion must be made to vacate the same, if a review is desired, and appeal taken from the order denying such motion. An appeal does not lie from the original order. *Palen v. Bushnell*, 68 Hun, 554, 52 St. Rep. 556, 22 Supp. 1044.

An order of a city court in supplementary proceedings which directed the debtor to pay the amount of the judgment to the sheriff, affects a substantial right, and an appeal therefrom lies to the Common Pleas. *Blake v. Bolte*, 12 Misc. 405, 33 Supp. 617, 67 St. Rep. 323. No motion to vacate or modify the order of a county judge adjudging the debtor in contempt, in refusing to obey an order in proceedings on a judgment of a county court, is necessary, but an appeal lies to the General Term from such order. *Weaver v. Brydges*, 85 Hun, 503, 66 St. Rep. 742, 33 Supp. 132.

An order for examination will not be vacated on an affidavit of the debtor and her husband that she had not been personally served with a summons, if the judgment had been entered upon default, and the roll contained an affidavit of personal service in the judgment, and where the defendant had never moved to open the default or to vacate the judgment. *Greenhall v. Unger*, 20 Misc. 412, 45 Supp. 1035. Supplementary proceedings are special proceedings, and the court has not and cannot confer greater jurisdiction than is conferred by statute. *Maass v. McEntgart*, 20 Misc. 676, 46 Supp. 534.

An examination in supplementary proceedings cannot be denied merely because the debtor shows that he has real property subject to levy. *11th Ward Bank v. Heather*, 22 Misc. 87, 48 Supp. 449, reversing 21 Misc. 539, 47 Supp. 718. A notice of motion to set aside an order for a jurisdictional defect is not objectionable, because it does not specify the defect. *Matter of Zelic v. Vroman*, 22 Misc. 486, 50 Supp. 836.

The following decisions were made under the former Code: An appeal lies from an order made by a county judge in an action originating in a justice's or county court. *Crouse v. Whipple*, 34 How. 333. The appeal can be heard only at General Term in the district where the venue is laid and judgment roll filed. *Mallory v. Gulick*, 15 Abb. 307, n.; *Gould v. Torrance*, 19 How. 560. An appeal may be taken from an order vacating an order for the examination of the judgment debtor. *Hawes v.*

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Barr, 7 Robt. 452; *Conway v. Hitchins*, 9 Barb. 378. And an order dismissing proceedings to compel an appearance for examination is appealable to the General Term as affecting a substantial right. *Holstein v. Rice*, 15 Abb. 307. On appeal, objections to the preliminary affidavits, or to the regularity of the execution, will not be entertained unless it appears they were taken below. *Union Bank v. Sargeant*, 53 Barb. 452. If the appeal is from an order requiring payment of the judgment, the whole case is open. *Crouse v. Wheeler*, 33 How. 337. An appeal with security to stay proceedings suspends the proceedings, but does not authorize a dismissal. *Cowdry v. Carpenter*, 17 Abb. 107. But an appeal without a stay does not prevent enforcing payment. *Arnoux v. Homans*, 32 How. 382. Where there is no stay the debtor may be punished for violation of the order, even though it is reversed on appeal. *Woolf v. Jacobs*, 36 N. Y. Super. 408. The provision as to the mode of review is said by the codifiers, in their report to the legislature, to be intended to conform to the decision in *West Side Bank v. Pugsley*, 47 N. Y. 368. It was held in *Bassett v. Wheeler*, 84 id. 466, a proceeding for the collection of a tax, that it is competent for a person against whom supplementary proceedings have been instituted, *ex parte*, to move for the dissolution of the order for appearance and examination, on the ground that it was improvidently granted.

ARTICLE XVIII.

RECEIVER IN SUPPLEMENTARY PROCEEDINGS.

SUB. I. APPOINTMENT OF RECEIVER. §§ 2464, 2465, 2466, 2467, 2470.

2. VESTING OF TITLE IN RECEIVER. §§ 2468, 2469. Rule 78.

3. RECEIVER SUBJECT TO CONTROL OF COURT. § 2471.

SUB. I. APPOINTMENT OF RECEIVER. §§ 2464, 2465, 2466,
2467, 2470.

§ 2464. When and how receiver may be appointed.

At any time after making an order, requiring the judgment debtor, or any other person, to attend and be examined, or issuing a warrant, as prescribed in article first of this title, the judge to whom the order or warrant is returnable may make an order, appointing a receiver of the property of the judgment debtor. At least two days' notice of the application for the order appointing a receiver, must be given personally to the judgment debtor, unless the judge is satisfied that he cannot, with reasonable diligence, be found within the State; in which case, the order must recite that fact, and may dispense with notice, or may direct notice to be given in any manner which the judge thinks proper. But where the order to attend and be exam-

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ined, or the warrant, has been served upon the judgment debtor, a receiver may be appointed upon the return day thereof, or at the close of the examination, without further notice to him.

Co. Proc. § 298.

§ 2465. Notice to other creditors.

The judge must ascertain, if practicable, by the oath of the judgment debtor, or otherwise, whether an action, specified in article first of title fourth of chapter fifteenth of this act, or a special proceeding instituted as prescribed in article first of this title, is pending against the judgment debtor. If either is pending, and a receiver has not been appointed therein, notice of the application for the appointment of a receiver, and of all the subsequent proceedings respecting the receivership, must be given, in such a manner as the judge directs, to the judgment creditor prosecuting it.

Id., part of § 298.

§ 2466. Only one receiver to be appointed. Former receivership may be extended.

Only one receiver of the property of a judgment debtor shall be appointed. Where a receiver thereof has already been appointed, the judge, instead of making the order prescribed in the last section but one, must make an order, extending the receivership to the special proceeding before him. Such an order gives to the judgment creditor the same rights as if a receiver was then appointed upon his application; including the right to apply to the court to control, direct, or remove the receiver, or to subordinate the proceedings in or by which the receiver was appointed, to those taken under his judgment.

Id., part of § 298; see Rules 84 and 85.

§ 2467. Order to be filed and recorded.

An order appointing a receiver, or extending a receivership, must be filed in the office of the clerk of the county, wherein the judgment roll in the action is filed; or, if the special proceeding is founded upon an execution issued out of a court, other than that in which the judgment was rendered, in the office of the clerk of the county, wherein the transcript of the judgment is filed.

Co. Proc., part of § 298.

§ 2470. County clerk to record orders, etc.; penalty for neglect.

Each county clerk must keep in his office a book, indexed to the names of the judgment debtors, styled, "book of orders appointing receivers of judgment debtors." A county clerk, in whose office an order or a certified copy of an order is filed, as prescribed in § 2467 or § 2468 of this act, must immediately note thereupon the time of filing it, and, as soon as practicable, must record it, in the book so kept by him. He must also, upon request, furnish forthwith to any party or person interested, one or more certified copies thereof. For each omission to comply with any provision of this section, a county clerk forfeits, to the party aggrieved, two hundred and fifty dollars, in addition to all damages sustained by reason of the omission.

Co. Proc. § 298; see §§ 1247 and 1248.

To authorize the appointment of a receiver the proceedings must be on notice to the debtor. *Barker v. Johnson*, 4 Abb. 435; *Kemp v. Harding*, 4 How. 178; *Whitney v. Welch*, 2 Abb. N. C. 442; *Morgan v. Von Kohnstamm*, 9 Daly, 355; *Stohn v. Eppstein*,

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14 Abb. N. C. 332. A receiver may be appointed of the judgment debtor's property generally, but not of a particular debt or debts, or of a specified portion of his property. *Andrews v. Glenville, etc., Co.*, 11 Abb. (N. S.) 578; *Kemp v. Harding, supra*. The application must be made to the judge who granted the order for examination. *Ball v. Goodenough*, 37 How. 479. The notice must be served two days before return day, unless, with due diligence, the debtor cannot be found within the State. *Morgan v. Von Kohnstamm*, 60 How. 161. A verbal notice is insufficient. *Ashley v. Turner*, 22 Hun, 226. The receiver may be appointed upon the examination where had before a judge. *Groot v. Greeley*, 5 Law Bull. 69. It is proper to make an order that the debtor appear before the judge on the Monday succeeding his examination, and a receiver may be then appointed. *Sickels v. Hanley*, 4 Abb. N. C. 231. Where there is a controversy as to title to property claimed to belong to the debtor, a receiver is proper. *Dickinson v. Onderdonk*, 18 Hun, 479; *People v. Hulburt*, 5 id. 446; *Rodman v. Henry*, 17 N. Y. 482; *Ormes v. Baker*, 17 Week. Dig. 104; *Todd v. Crooke*, 4 Sandf. 694; *Bunacleigh v. Poolman*, 3 Daly, 236. It is no answer to an application for a receiver that the examination has not shown the debtor to be the owner of any property. *Myers' Case*, 2 Abb. 476. Nor that the debtor is willing to allow his property to be sold under the execution, or that it could be sold. *Heroy v. Gibson*, 10 Bosw. 591; *Bailey v. Lane*, 15 Abb. 373, n. But see *Webb v. Overman*, 6 id. 92. But a receiver will not be appointed where the debtor has acquired real estate since return of execution, it not being the intent of the statute to cut off the debtor's right of redemption. *Bunn v. Daly*, 24 Hun, 526; *Tinney v. Langdon*, 60 How. 180; *Ashley v. Turner*, 22 Hun, 226. It is held, in *Dollard v. Taylor*, 33 N. Y. Super. 496, that a creditor has not an absolute right to have a receiver appointed in supplementary proceedings for the purpose of setting aside a fraudulent assignment, but the appointment is in the discretion of the court, as the creditor may proceed by bill in his own name. The courts latterly incline to treat the matter as discretionary, and more particularly in New York City. In *Matter of Edmunds*, 35 Hun, 367, it is held at General Term that there was nothing to receive, and hence no occasion for receivership; see *De Camp v. Dempsey*, 10 Civ. Pro. 210. The language of the section disposes of the controversy as to whether a receiver could

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be appointed before the close of the proceeding, in accordance with the views expressed by the codifiers on reporting the draft of the revision, and settles it in accordance with the practice in *Tillotson v. Wolcott*, 48 N. Y. 188; see *De Vivier v. Smith*, 1 How. (N. S.) 48. The books of a company showed that certain shares of stock stood in the name of the judgment debtor. He denied that he owned the stock, and stated that he had previously sold and disposed of it. *Held*, that the judgment creditor was not concluded by this statement, but could have a receiver appointed to contest the question. That the appointment of a receiver in no way prejudiced the company. *Hoyt v. Mann*, 7 St. Rep. 420. An order for the appointment of a receiver, founded on the voluntary appearance of the judgment debtor, is valid. *Bingham v. Disbrow*, 37 Barb. 24. No one but the judgment debtor can take advantage of irregularities in the appointment of a receiver. *Underwood v. Sutcliffe*, 10 Hun, 453; reversed on another point, 77 N. Y. 58.

An order appointing a receiver is void if made without notice to the judgment debtor, unless the judge is satisfied that the debtor cannot, with reasonable diligence, be found within the State. A mere statement that he cannot be found with due diligence is insufficient. *Grace v. Curtis*, 3 Misc. 558, 62 St. Rep. 514, 23 Supp. 321.

The notice of application for an order appointing a receiver must be personally served upon the judgment debtor, and, unless so served, the order appointing a receiver is void. *Sayles v. Best*, 49 St. Rep. 460, 20 Supp. 951. If there be other creditors who have supplementary proceedings against the judgment debtor, it is a fatal defect to fail to serve a notice of the application for the appointment of a receiver upon such other creditors. *Sheffield Farms Co. v. Burr*, 11 Misc. 638. Under the old Code of Procedure, it seems that notice to the judgment debtor was not a condition precedent to the appointment of the receiver, so held in a case decided in 1890. *Terry v. Bange*, 57 Super. Ct. 546, 30 St. Rep. 285, 9 Supp. 311, 18 Civ. Pro. 288.

The failure to appoint the receiver on the return day of the application is a mere irregularity, and the judgment debtor alone can take advantage of it. *Darrow v. Riley*, 5 Misc. 363, 26 Supp. 91. A countermand of the execution does not render the appointment of a receiver void, and the same is in force until

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vacated, and is sufficient to support the receiver's right to act under the order extending his receivership under § 2466. *Palmer v. Colville*, 63 Hun, 536, 45 St. Rep. 706, 18 Supp. 509. A receiver cannot be appointed where the judgment has been paid during an adjournment of the proceeding, although without the knowledge of the creditor's attorney, and although no costs have been awarded. *Paterson Bros. v. Goorley*, 14 Misc. 46, 69 St. Rep. 651, 35 Supp. 297.

If the judge has jurisdiction to appoint a receiver, all directions in the order, as to the bond, its character, etc., are to be reviewed, if erroneous by appeal, if they are irregular by motion. *Terry v. Bange*, 30 St. Rep. 285, 9 Supp. 311, 57 Super. Ct. 546, 18 Civ. Pro. 288, *supra*. Until the receiver files his bond, his appointment is not complete. *National Wall Paper Co. v. Gerlach*, 15 Misc. 640, 72 St. Rep. 678, 37 Supp. 428. The appointment of a receiver is a part of the whole proceeding and is reviewable only under § 2433. *Moschell v. Boor*, 66 Hun, 557, 50 St. Rep. 238, 21 Supp. 683. An order appointing a receiver in supplementary proceedings which recites the jurisdictional facts is conclusive evidence of the regularity of the appointment when questioned collaterally and is *prima facie* evidence of jurisdiction. *Palmer v. Colville*, 63 Hun, 536, 45 St. Rep. 706, 18 Supp. 509, *supra*.

It is a waiver of the two days' personal notice if the debtor appears by attorney upon an application for the appointment of receiver. *Moore v. Empie*, 17 App. Div. 218, 45 Supp. 539. The production and proof of an order appointing a receiver in these proceedings made by the court or judge authorized to make the same, and reciting the jurisdictional facts, furnishes conclusive evidence of the regularity of such appointment when questioned collaterally in an action by the receiver to set aside transfers. *Stiefel v. Berlin*, 20 Misc. 194, 45 Supp. 746. The appointment of the receiver in supplementary proceedings cannot be attacked collaterally. *Stiefel v. Berlin*, 28 App. Div. 103, 51 Supp. 147, 27 Civ. Pro. 216. It seems that in supplementary proceedings, a receiver cannot be appointed of a joint stock association. *Bruns v. Kane*, 12 Civ. Pro. 87. Where a judgment debtor has consented to an order appointing a receiver in supplementary proceedings, the rule that the judgment creditor must exhaust his remedy by execution before proceeding against real estate

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by a receiver has no force. *People ex rel. O'Connor v. Sickles*, 59 Hun, 342, 36 St. Rep. 548, 13 Supp. 101.

Precedent for Order Appointing Receiver.

SUPREME COURT.

The National Bank of Port Jervis

agst.

Jesse C. Hansee.

An order having been heretofore duly made by me, pursuant to the Code of Civil Procedure, requiring the above-named defendant, Jesse C. Hansee, to make discovery on oath before Hon. William S. Kenyon, county judge of Ulster County, in relation to his property, and he having been examined accordingly: Now, on motion of W. S. Groo, attorney for Cornelia S. Hansee, I do hereby order that George R. Adams, of Rondout, Ulster County, be and he hereby is appointed receiver of the property of Jesse C. Hansee; that said receiver before entering upon the execution of his trust execute a bond with sufficient sureties, to be by me approved, to the people of the State of New York, in the penal sum of \$750, conditioned that he will faithfully discharge the duties of such trust and that said George R. Adams upon filing said bond and upon filing and recording this order in the office of Ulster County clerk, be invested with all the rights and powers as receiver according to law. That said Jesse C. Hansee execute, acknowledge, and deliver to such receiver a proper and valid assignment and conveyance of all his lands and real estate, wheresoever the same are situate; that the sum of \$30 be allowed to Cornelia C. Hansee for costs of this proceeding, it appearing that she has a valid assignment of the judgment against the said Jesse C. Hansee, and is the real party in interest; and said Jesse C. Hansee is hereby enjoined and restrained from making any disposition of, or interfering with, his property, equitable interests, things in action, or any of them, except in obedience to this order, until further order in the premises.

Dated January 6, 1887.

(Signature of Judge.)

Form for Receiver's Bond.

Know all men by these presents that we, Harrison Brooks, of the city of Kingston, Ulster County, by occupation a builder, and Daniel Lane, of the town of Hurley, said county, by occupation a farmer, are held and firmly bound unto the people of the State of New York in the sum of \$5,000, to be paid to the said people; for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents. Sealed with our seals. Dated the 9th day of February, 1887.

WHEREAS, By an order made by Hon. William S. Kenyon, on the 1st day of February, 1887, in an action in the Supreme Court

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wherein George Haines was plaintiff and Frank Wood defendant, the above bounden George V. Dumont was appointed receiver of all debts, property, equitable interest, and things in action of Frank Wood, a judgment debtor, pursuant to the provisions of the Code of Procedure :

Now, therefore, the condition of this obligation is such that if the said George V. Dumont shall faithfully discharge the duties of his trust as such receiver, and otherwise perform his office in all things according to the true intent and meaning of said order, then this obligation shall be void ; otherwise to be in full force and effect.

(Signatures.)

(Add acknowledgment and justification clauses with approval.)

The fact that a receiver of a judgment debtor's property has been appointed in supplementary proceedings does not bar an application in a creditor's action, nor is it necessary to appoint the same receiver in such action. This section applies only to supplementary proceedings. *State Bank of Syracuse v. Gill*, 23 Hun, 410. Where a receiver has been appointed in proceedings instituted in favor of one judgment creditor, it is in the discretion of the court, in an action brought by another judgment creditor, to set aside such proceedings on the ground of collusion, to appoint another receiver, and to direct the first receiver to hand over to him the property received. *Connolly v. Koetz*, 78 N. Y. 620. Where the examination of a debtor was taken and closed, and three days thereafter an order was entered extending a receivership, without notice to the judgment debtor, *held*, that such order was unauthorized, and that the same reason for giving notice to a judgment debtor on the appointment of a receiver applies with equal force to an order extending a receivership. *Benjamin v. Myers*, 3 St. Rep. 284. The court has no power, without notice to the judgment debtor, to make an order directing a receiver appointed in supplementary proceedings to direct the application of any portion of the funds coming into his hands in payment of judgments, other than that under which he was appointed, or those to which his receivership has been extended under this and the two preceding sections. It is his duty to restore to the judgment debtor any surplus after the satisfaction of these judgments, and such an order, made without notice to the debtor, is not binding on him, and would be no protection to the receiver. *Goddard v. Stiles*, 90 N. Y. 199. The same case was again heard on appeal, 99 N. Y. 640. But no ruling of law was made, the decision turning on the facts.

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No one but a judgment debtor can take advantage of a defective order for a defective notice to other creditors, where an order is asked for the appointment of a receiver under the section. But an oral direction as to the notice to be given to such other judgment creditors is a sufficient compliance with the section. *Darroz v. Riley*, 5 Misc. 363, 26 Supp. 91. It is only the judgment debtor who can take advantage of any irregularities in the appointment of a receiver, and such irregularities cannot be taken advantage of by other judgment creditors. *Baker v. Brundage*, 79 Hun, 382, 61 St. Rep. 498, 29 Supp. 792. The appointment of a receiver in supplementary proceedings cannot be attacked collaterally. *Stiefel v. Berlin*, 28 App. Div. 103, 51 N. Y. Supp. 147, 85 St. Rep. 147.

The requirements as to notice to other creditors of an application for the appointment of a receiver, may be waived by such other creditors, and they may also waive their right to priority. *Barnett v. Moore*, 20 Misc. 518, 46 Supp. 668.

Precedent for Order Extending Receivership.

ULSTER COUNTY COURT.

Herman Lang
<i>agst.</i>
Josephus J. Buckley.

It appearing by the papers and proceedings herein that James Countryman, of the city of Kingston, has heretofore been appointed receiver of the property of the said Josephus J. Buckley, the judgment debtor, in an action instituted as prescribed in Article I. of title 12 of chapter 17 of the Code of Civil Procedure by Herman Lang against Josephus J. Buckley, the judgment debtor; and it appearing to my satisfaction that the said receiver has, upon such appointment, given ample security for the faithful discharge of his duties, as such, and that such receivership is pending undischarged, I do hereby order that the said receivership be and it hereby is extended to the special proceeding herein, pursuant to the provisions of § 2466 of the Code of Civil Procedure.

Dated June 1, 1887.

WILLIAM S. KENYON,
County Judge of Ulster County.

After the death of a judgment debtor a receivership cannot be extended. *Matter of Tribune Association*, 13 Misc. 326, 68 St. Rep. 363, 34 Supp. 459.

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Where a receivership has been extended he holds the funds of the judgment debtor for those who establish the prior right to it. *Guggenheimer v. Stephens*, 26 St. Rep. 245, 7 Supp. 263, 17 Civ. Pro. 383. A receiver appointed in supplementary proceedings cannot recover judgment for more of the proceeds of a fraudulent conveyance than equals the judgment he represents and the expenses of the receivership and reference. *Stiefel v. Berlin*, 28 App. Div. 103, 51 N. Y. Supp. 147, 85 St. Rep. 147. A receiver appointed in supplementary proceedings takes title to endowment policies payable to the debtor or his estate. *Reynolds v. Aetna Ins. Co.*, 28 App. Div. 591, 51 N. Y. Supp. 446, 85 St. Rep. 446.

If, pending an examination upon one judgment, the debtor voluntarily submits to an examination and the appointment of a receiver under a second judgment, the extension of the receivership to the first judgment entitles such first judgment to priority of payment from the funds held by receiver. *Youngs v. Klunder*, 27 St. Rep. 32, 7 Supp. 498.

SUB. 2. VESTING OF TITLE IN RECEIVER. §§ 2468, 2469. Rule 78.

§ 2468. When property is vested in receiver.

The property of the judgment debtor is vested in a receiver, who has duly qualified, from the time of filing the order appointing him, or extending his receivership, as the case may be; subject to the following exceptions:

1. Real property is vested in the receiver, only from the time when the order, or a certified copy thereof, as the case may be, is filed with the clerk of the county where it is situated.
2. Where the judgment debtor, at the time when the order is filed, resides in another county of the State, his personal property is vested in the receiver only from the time when a copy of the order, certified by the clerk in whose office it is recorded, is filed with the clerk of the county where he resides.

§ 2469. How receiver's title to personal property extended by relation.

Where the receiver's title to personal property has become vested, as prescribed in the last section, it also extends back by relation, for the benefit of the judgment creditor in whose behalf the special proceeding was instituted as follows:

1. Where an order, requiring the judgment debtor to attend and be examined, or a warrant, requiring the sheriff to arrest him and bring him before the judge, has been served, before the appointment of the receiver, or the extension of the receivership, the receiver's title extends back, so as to include the personal property of the judgment debtor, at the time of the service of the order or warrant.
2. Where an order or warrant has not been served, as specified in the foregoing subdivision, but an order has been made, requiring a person to attend and be examined, concerning property belonging, or a debt due, to the judgment debtor, the receiver's title extends to the personal property belonging to the judgment debtor, which was in the hands, or under the control, of the person or corporation thus re-

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quired to attend, at the time of the service of the order; and to a debt then due to him from that person or corporation.

3. In every other case where notice of the application for the appointment of the receiver was given to the judgment debtor, the receiver's title extends to the personal property of the judgment debtor, at the time when the notice was served, either personally or by complying with the requirements of an order, prescribing a substitute for personal service.

4. Where the case is within two or more of the foregoing subdivisions of this section, the rule most favorable to the judgment creditor must be adopted.

5. [Added, 1892.] No person shall be appointed a receiver in this State who is not a resident thereof, nor shall any person continue to act as receiver after he ceases to be a resident thereof, and the judgment creditor may apply to the court or judge that appointed such receiver, within thirty days after said receiver ceases to be a resident of this State, for the appointment of another person in his place, upon such notice to the persons interested as the court or judge may direct.

But this section does not affect the title of a purchaser in good faith, without notice, and for a valuable consideration; or the payment of a debt in good faith and without notice.

RULE 78. Whenever a receiver, appointed under proceedings supplementary to execution, shall apply for leave to bring an action, he shall present and file with his application the written request of the creditor in whose behalf he was appointed, that such action be brought. Or else he shall give a bond with sufficient security, and properly acknowledged and approved by the court, to the person against whom the action is to be brought, conditioned for the payment of any costs which may be recovered against such receiver. And leave to bring actions shall not be granted except on such written request, or on the giving of such security. In all other cases, where a receiver applies to the court for leave to bring an action, he shall show in such application that he has sufficient property in his actual possession to secure the person against whom the action is to be brought, for any costs which he may recover against such receiver. Otherwise the court may require the receiver to give such bond, conditioned for the payment of costs, and with such security as is above mentioned.

Section 2468 applies only to real estate situated within the State. *Smith v. Tozer*, 3 St. Rep. 363.

See, as to security to perfect appointment, § 715. The receiver's appointment is not complete until his bond is filed. *Voorhees v. Seymour*, 26 Barb. 569; *Conger v. Sands*, 19 How. 8; *Johnson v. Martin*, 1 T. & C. 504. The last case is authority for the proposition, that, when the order required a bond with sureties from the receiver, he had no power to act until a bond with two sureties was filed, and the party against whom suit was brought was allowed to raise the question. But the omission of a seal upon a bond given by a receiver is an irregularity which can only be taken advantage of by the judgment debtor. *Morgan v. Potter*, 17 Hun, 403. As to effect of failure to file bond upon title of successor, see *Steele v. Sturges*, 5 Abb. 442. It was held in *Banks v. Potter*, 21 How. 469, that where the receiver had given ample security on

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his first appointment, he need not give further security on being appointed, pending his first appointment as receiver of the same estate in another action. It is said, in *Wright v. Nostrand*, 94 N. Y. 31, reversing 47 N. Y. Super, 441, that the only interest a defendant has in the regularity of the appointment of a receiver is to see that he rightfully represents the plaintiffs in order that they may not be subjected to other actions for the same cause by persons holding a superior right. The same case discusses the provisions of § 298 of the old Code, for which this section is a substitute, and should be referred to for examination in reference to questions arising under this section, as should the decision in the court below. Where the judgment roll is filed in the county where the debtor resides, and his real estate lies in the same county, a receiver becomes vested with the real estate upon the recording of the order appointing him. It is not necessary to record a certified copy of the order. *Fredericks v. Moir*, 28 Hun, 417; *DuBois v. Cassidy*, 75 N. Y. 298.

Where the order appointing a receiver directed the debtor to assign his real estate, but contained no directions as to delivering possession, the debtor cannot be punished for contempt for refusing to deliver such possession. *Tinkev v. Langdon*, 60 How. 180. The court may, however, on motion compel the debtor to deliver his property to the receiver. *Fenner v. Sanborn*, 37 Barb. 610; *Clan Ranald v. Wyckoff*, 41 N. Y. Super. 527. The time when title to the real estate vested in the receiver was fruitful of discussion prior to the amendment to § 298 of the old Code in 1862 and 1863, among the decisions being *Porter v. Williams*, 9 N. Y. 142, and *Chantauqua Bank v. Risley*, 19 id. 369; *Moak v. Coats*, 33 Barb. 498. Since that time are *Rogers v. Corning*, 44 id. 229; *Manning v. Evans*, 19 Hun, 500; *Wing v. Disse*, 15 id. 190; *Cooney v. Cooney*, 65 Barb. 524; *Hayes v. Buckley*, 53 How. 173, holding the rule as now embodied in this section, and *Scott v. Elmore*, 10 Hun, 68, *contra*. An *ex parte* order directing the debtor to turn over specific property to the receiver was set aside. *Reed v. Champayne*, 5 Week. Dig. 227. The receiver cannot claim property acquired subsequent to the instituting of the proceeding or to his appointment. *Thorn v. Fellows*, 5 Week. Dig. 473; *Graff v. Bonnett*, 25 How. 470; *Merritt v. Sawyer*, 6 T. & C. 160; *Genet v. Foster*, 18 How. 50; *DuBois v. Cassidy*, 75 N. Y. 298. He cannot maintain replevin. *Campbell v. Fish*, 8

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Daly, 162. He does not take exempt property, however broad the language of the order. *Andrews v. Rotven*, 28 How. 26; *Finnin v. Malloy*, 33 N. Y. Super. 382; *Cooney v. Cooney*, 65 Barb. 524; *Tillotson v. Wolcott*, 48 N. Y. 188; *Hancock v. Scars*, 93 id. 79. A receiver does not stand merely in the place of the debtor, but represents the creditors, at whose instance he was appointed. *Seymour v. Wilson*, 15 How. 353; *Bostwick v. Menck*, 40 N. Y. 383; *Porter v. Williams*, 9 id. 142; *Underwood v. Sutcliffe*, 77 id. 58; see *Wright v. Nostrand*, 94 id. 31. *Kennedy v. Thorp*, 51 id. 174, does not necessarily conflict with this rule. See Laws 1858, chap. 314, authorizing assignee to bring action to set aside fraudulent conveyances. The receiver is entitled to the rents and profits of the debtor's real estate. *Farnham v. Campbell*, 10 Paige, 598. To the interest of the husband as tenant by the curtesy. *Beamish v. Hoyt*, 2 Robt. 307; *Ellsworth v. Cook*, 8 Paige, 643. To a widow's right of dower. *Moak v. Coats*, 33 Barb. 498; *Thompson v. Fonda*, 4 Paige, 448; *Stewart v. McMartins*, 5 Barb. 438.

Where, in pursuance of an order appointing a receiver in proceedings supplementary to execution against a widow who was entitled to dower, but which had not been assigned to her, she conveyed her dower interest to the receiver, he having complied with the conditions of § 2468 for the vesting of the property of the judgment debtor in him, he was held entitled to maintain an action to admeasure the dower in his name as receiver. *Payne v. Becker*, 87 N. Y. 154, reversing 22 Hun, 28. But cannot, it seems, bring partition. *Payne v. Becker*, *supra*; *DuBois v. Cassidy*, 75 N. Y. 299; *Miller v. Levy*, 46 N. Y. Super. 207. *Contra*, *Powelson v. Reeve*, 2 Week. Dig. 375. An annuity passes to the receiver. *De Graaf v. Clason*, 11 Paige, 136; *Hallett v. Thompson*, 5 id. 583; *Ten Broeck v. Sloo*, 13 Barb. 28. As does a fund where the debtor is trustee as well as *cestui que trust*. *Craig v. Hone*, 2 Edw. Ch. 554; *McEwen v. Brewster*, 19 Hun, 337. A chattel mortgage filed after the proceedings are instituted does not divest the receiver of the title. *Clark v. Gilbert*, 14 Week. Dig. 241. Otherwise, as to a valid mortgage. *Campbell v. Fish*, 8 Daly, 161; *Tinkey v. Langdon*, 60 How. 180, reversed on another point, 13 Week. Dig. 384; *Gardner v. Smith*, 29 Barb. 74; *Manning v. Monaghan*, 23 N. Y. 539. Real estate, although out of the State, vests in the receiver. *Chautauqua Bank v.*

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Risley, 19 N. Y. 374. The receiver cannot have the possession of property alleged to belong to the debtor but in the hands of a third person, who substantially disputes the title. *Devey v. Finn*, 18 Week. Dig. 558. Where a mortgagee sells, under a chattel mortgage, more property than is sufficient to pay the mortgage debt, bids the same in himself, and takes possession, claiming the property under this title, the mortgagor may elect to treat the entire sale as valid, or to regard the amount for which the property sold in excess of the indebtedness secured as unpaid purchase money in the hands of the mortgagee, and a receiver of the mortgagor, appointed in supplementary proceedings, may maintain an action against the mortgagee to recover such surplus. *Davenport v. McChesney*, 86 N. Y. 242. The debtor will not be directed to deliver to a receiver possession of real property upon which the judgment was a lien; the remedy is by sale under execution. *Albany National Bank v. Gaynor*, 67 How. 421. The appointment of assignees in bankruptcy of individual partners confers no power on the assignees therein to take firm property, and hence has no legal effect upon the ownership of a firm judgment, or the right of a receiver appointed in proceedings supplementary to execution thereon to maintain an action to reach the debtor's property. The fact that the bank in whose favor the judgment was rendered had ceased to be a corporation by reason of its bankruptcy subsequent to the recovery of the judgment does not invalidate plaintiff's title as receiver. Although in an action by a receiver to set aside transfers of real property he must show proceedings such as would vest title thereto in him, it is not necessary where only personal property is concerned. *Wright v. Nostrand*, 94 N. Y. 31. A receiver cannot be compelled in another action, to which neither he nor the creditor was a party, to pay over money received by him as property of the debtor, nor should he be directed to pay over moneys without deducting for his commissions and expenses. *Gelston v. Syracuse Savings Bank*, 29 Hun, 594. Payment of a judgment by a debtor does not *ipso facto* discharge the receiver. He may have a claim for expenses incurred to be paid out of the fund. *Crooks v. Findley*, 3 Law Bull. 26. It is said in *Palen v. Bushnell*, 18 Abb. 301, that a receiver may recover usurious premiums paid by the debtor. Reversed on another point, 46 Barb. 24. The receiver can only recover so much of the property of the debtor fraudulently trans-

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ferred as will satisfy the creditors at whose instance he is appointed. The transfer is good as against the debtor, and all creditors who take no steps to set it aside. *Bostwick v. Menck*, 40 N. Y. 383. The interest of a *cestui que trust* cannot be reached by the receiver except by action. *Scott v. Nevins*, 6 Duer, 172; see §§ 1879 to 2463. Where a trust is created in favor of the creditors of one praying the consideration of lands which are conveyed to another, the receiver is not the representative of the creditor in respect to it. See *Wood v. Robinson*, 22 N. Y. 564; *McCartney v. Bostwick*, 32 id. 53; *Underwood v. Sutcliffe*, 77 id. 58. The receiver may be substituted as plaintiff in a pending suit brought by the debtor. *Matter of Waldo*, 6 Abb. N. C. 307. But it is a matter of discretion and not of right. *In re Application of Lansing*, 17 Week. Dig. 288.

A seat in the New York Cotton Exchange is property which passes to a receiver, and defendants, in an action brought therefor by a receiver, are not aided by defects in the appointment of the receiver; the judgment debtor consented and thereby waived all irregularities. The appointment cannot be questioned collaterally for irregularity, and the plaintiff may redeem such a seat. *Powell v. Waldron*, 89 N. Y. 328. As to the intent of § 2469, see *Pustet v. Flannelly*, 60 How. 67. The receiver may be required to give security for costs where bad faith in commencing the action is shown. *Kimberly v. Goodrich*, 22 How. 424; *Jenkins v. Stowe*, 2 Law Bull. 37; *Smith v. Clarke*, 1 id. 83; *Welch v. Bogert*, 3 Week. Dig. 402; *Bolles v. Duff*, 17 Abb. 48; *Briggs v. Vandenburg*, 22 N. Y. 467. He may be required to give security after obtaining leave to sue, and an order requiring security is not appealable. *Bolles v. Duff*, 17 Abb. 448; see § 3271. The court rules prescribe the procedure by a receiver on bringing suit.

Whether the receiver of an insolvent corporation shall be compelled to give security for costs is within the discretion of the court at Special Term, and the order is not appealable to the General Term or the Court of Appeals. *Briggs v. Vandenburg*, 22 N. Y. 467. The title of the judgment debtor's real and personal property vests in the receiver by operation of law, and no order is necessary that such real estate be delivered; therefore the debtor is not in contempt for disobeying an order requiring him to convey land to his receiver or in refusing to deliver possession. *First*

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National Bank of Canandaigua v. Martin, 49 Hun, 571, 18 St. Rep. 414, 2 Supp. 315, 15 Civ. Pro. 324; see, also, *Kimball v. Burrell*, 14 St. Rep. 536; *Pflugger v. Cornell*, 2 City Ct. 145.

A receiver takes the property of a judgment debtor subject to mechanics' liens which may have been filed against it prior to the time of the service of the preliminary order. *McCorkle v. Hermann*, 22 St. Rep. 519, 5 Supp. 881, reversed, 117 N. Y. 297, 27 St. Rep. 333. So, too, a receiver in proceedings against a contractor takes claims against a building for the construction thereof, subject to the equities of one who had furnished material at the instance of the contractor prior to the appointment of the receiver, although a mechanic's lien for such material is not filed until after the appointment of the receiver. *Deady v. Fink*, 5 Supp. 3. The claim of a receiver in supplementary proceedings is superior to mechanics' liens filed subsequently to the commencement of supplementary proceedings. *McCorkle v. Hermann*, 117 N. Y. 297, 27 St. Rep. 333, reversing 22 St. Rep. 519, 5 Supp. 881. A receiver requires no interest in a life insurance policy upon the life of the debtor, although the annual premium thereof is over \$500. The right of a creditor in such case can only be enforced by the creditor. *Masten v. Amerman*, 51 Hun, 244, 21 St. Rep. 222, 4 Supp. 681, reversing 20 Abb. N. C. 443. A receiver in supplementary proceedings cannot maintain an action to reach surplus income from the trust in favor of the debtor created by a person other than such judgment debtor. The power to proceed against such surplus trust fund is solely in the judgment creditor in a direct action. *Levey v. Bull*, 47 Hun, 350.

A receiver in supplementary proceedings cannot take possession, under an order of the city court of New York, of real estate conveyed to a third party, where there has been no adjudication as to the validity of the deed. If the interference of the referee be unlawful in bad faith, he may be charged personally with the costs of an action brought to restrain his interference. *Robinson v. Wood*, 39 St. Rep. 466, 15 Supp. 169. A receiver of a judgment debtor interested in an estate of which he is administrator may object upon an accounting of improper disbursements. *Matter of Rainey*, 5 Misc. 367, 26 Supp. 892.

Where the order appointing a receiver was never served upon the judgment debtor, nor upon the testamentary trustee, until

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after the judgment debtor had assigned interests in real property, the receiver cannot compel the testamentary trustee to account before the surrogate. *Estate of Sistaire*, 15 Supp. 709, 27 Abb. N. C. 34. If a receiver delays two years after a transfer of property by the judgment debtor, he cannot enjoin the suit of another judgment creditor who has begun to set aside the transfer, as by such delay he is guilty of laches. *First National Bank of Rondout v. Navarro*, 43 St. Rep. 813, 17 Supp. 900. Where a receiver asks an injunction to restrain the disposition of money in a bank, his complaint should state the amount of the claim or make allegations showing that the matter should be heard in equity. *Hughes v. McKenzie*, 39 St. Rep. 31, 14 Supp. 352. A judgment creditor who brought the first action to set aside a transfer of property by the judgment debtor has a preference over a receiver and all other creditors, and is not a necessary or proper party to an action brought for the same purpose by the receiver. *Metcalf v. Del Valle*, 64 Hun, 245, 46 St. Rep. 105, 19 Supp. 16.

Where a chattel mortgage is void as to creditors because it was not filed, a receiver in supplementary proceedings may bring an action to set aside the mortgage and recover the property or its value. *Stephens v. Perrine*, 143 N. Y. 481, 62 St. Rep. 843. Where a cause of action was assigned by a debtor before the commencement of supplementary proceedings, a receiver in such proceedings thereafter appointed cannot be substituted in place of the judgment debtor in an action brought by the latter. *Charlier v. Saginaw Steel S. S. Co.*, 7 App. Div. 609, 40 Supp. 278.

Proof of the title of the judgment debtor six months before the appointment of the receiver, does not in an action of replevin overcome the presumption of the defendant's ownership arising through possession of the title. *Wheeler v. Vanderveer*, 88 Hun, 233, 68 St. Rep. 721, 34 Supp. 799. As a cause of action for trespass to real estate is assignable it passes to a receiver in supplementary proceedings. *Bennett v. Woolfolk*, 80 Hun, 390, 62 St. Rep. 55, 30 Supp. 328. A receiver in supplementary proceedings is a proper party defendant in a foreclosure action. *Voight v. Schenck*, 54 Hun, 548, 28 St. Rep. 2, 7 Supp. 864.

The receiver is vested with the legal title to all the judgment debtor's personal property, and may prosecute actions to set aside transfers of such property by the debtor in fraud of his creditors.

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Mandeville v. Avery, 124 N. Y. 376, 36 St. Rep. 338, reversing 57 Hun, 78, 32 St. Rep. 267, 10 Supp. 323. The receiver cannot maintain an action to set aside a former transfer as fraudulent, as he only acquires title to the property of the debtor then owned by him. *Metcalf v. Del Valle*, 64 Hun, 245, 46 St. Rep. 195, 19 Supp. 16. A person whose appointment as receiver in supplementary proceedings is invalid because the proceedings were brought before the issue of an execution against the property of the debtor, should not be permitted to set aside as void an assignment made by the judgment debtor of a claim against a village. *Bannigan v. Village of Nyack*, 25 App. Div. 150, 49 Supp. 199.

Upon filing the receiver's appointment in a proper office he takes title to the real estate of the debtor, but such title is qualified and does not exhaust the debtor's title, and thus a subsequent conveyance by the debtor transfers the title to the grantee subject to the claim of the receiver, and such grantee has the right to redeem on an execution sale. *Moore v. Duffy*, 74 Hun, 78, 57 St. Rep. 746, 26 Supp. 340. But the filing of the order appointing a receiver in another county does not vest him with title to the debtor's real estate in such county, unless the judgment be docketed there, and the remedy exhausted by execution. One to whom the debtor conveyed such real estate, after the appointment of the receiver, may move to set aside an order which directed the receiver to sell the real estate, because a conveyance by the debtor of property in a county where a judgment is not docketed is valid against a receiver, although the transfer was made after the order appointing the receiver. *Fancuil Hall Nat. Bk. v. Bussing*, 147 N. Y. 665, 71 St. Rep. 269, reversing 65 St. Rep. 874, 32 Supp. 1142.

Where a receiver was appointed and qualified in March, and on the August following his receivership was extended by consent of attorneys, and the order therefor filed, but the first order was not filed until nearly a year after the appointment of a receiver, and before the filing of such first order the debtor has conveyed his real estate, it was held, that the real estate had vested in the receiver by virtue of § 2468, and the debtor's deed conveyed no title. *Webb v. Osborne*, 27 St. Rep. 792, 7 Supp. 762, 15 Daly, 406. In order to affect real estate, the order appointing the receiver must be filed. *Moyer v. Moyer*, 7 App. Div. 523, 40 Supp. 258.

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A receiver takes no title to property acquired by the judgment debtor after such receiver's appointment, nor can he claim or enforce any right that subsequently becomes vested in the judgment debtor. *Norcross v. Hollingsworth*, 83 Hun, 127, 64 St. Rep. 264, 31 Supp. 627. A receiver of the property of a sheriff cannot maintain an action on an under-sheriff's bond, for the under-sheriff's failure to pay over moneys collected, in the absence of proof that the sheriff has made good the default, as the sheriff's right to receive the money is official, and not an individual right. *Norcross v. Hollingsworth*, 83 Hun, 127, 64 St. Rep. 264, 31 Supp. 627 (*supra*).

Where executors paid by check sums due heirs, and the receiver of an heir appointed in supplementary proceedings demanded the debtor's share before the check had passed into the hands of a *bona fide* holder, but the check was paid by the bank, it was held that the receiver had no title to the debt as against the bank created by the deposit by the executors. *O'Connor v. Mechanics' Bank*, 124 N. Y. 324, 36 St. Rep. 277, reversing 54 Hun, 272, 27 St. Rep. 1, 7 Supp. 380. Where the judgment debtor is entitled to a legacy, the receiver is entitled to as much of the legacy as will pay the judgment and the expenses of the receivership. *Monahan v. Fitzpatrick*, 15 Misc. 508, 49 Supp. 857. So also the receiver takes unliquidated claims for damage for a tort the same as property, but such claims should be prosecuted by the receiver to judgment and the debt paid from the recovery, it should not be sold by the receiver. *Bryan v. Grant*, 87 Hun, 68, 67 St. Rep. 639, 33 Supp. 957. Where the judgment debtor has been an executor and has assigned a policy of insurance which was security for an alleged indebtedness to the estate to a successor, the right of the debtor to such property may be considered to be substantially disputed, and an order should not be made requiring delivery of policy therein; but an order should be made that he assign and convey such policy, and all his title and interests therein. *Frost v. Craig*, 18 Civ. Pro. 296, 16 Daly, 107, 30 St. Rep. 848, 9 Supp. 528.

The salary of a public officer may be reached in supplementary proceedings, after it has been paid to him. *Blake v. Bolte*, 10 Misc. 333, 63 St. Rep. 408, 31 Supp. 124, 24 Civ. Pro. 166. Where an insolvent debtor paid a thousand dollars to a person for the board of himself and wife for two years to come, the same is fraudulent

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as to creditors and may be reached in supplementary proceedings ; it should be ordered to be paid by the depositor to the receiver. *Davis v. Briggs*, 24 St. Rep. 896, 5 Supp. 323. Where the judgment debtor is a widow holding proceeds of a life insurance policy on the life of her husband, the sum may be reached in supplementary proceedings. *Millington v. Fox*, 13 Supp. 334.

The receiver of a physician may sue on the accounts owing to the physician, and subpoena the debtor as a witness, but the physician cannot be compelled to turn over his account books to the receiver. *Kelly v. Levy*, 29 St. Rep. 659, 8 Supp. 849. The court has no power to require the judgment debtor to transport property to the receiver's office under pain of imprisonment ; so held where an order directing the delivery at the receiver's office of furniture, wagons, hay, oats, and grain, not specifying the quantity of each. *Smith v. McQuade*, 59 Hun, 374, 36 St. Rep. 556, 13 Supp. 63. The receiver in supplementary proceedings cannot reach a vested interest in real property subject to a trust, nor can the same be sold by him, for the judgment is a lien on such interest to be enforced by execution. *Monolithic Drain & Conduit Co. v. Dewsnap*, 41 Supp. 224, 25 Civ. Pro. 380. The receiver is vested with the debtor's title to personal property pledged as a security for debt, and when such debt is paid, is entitled to recover the property from the pledgee, even though the latter be a judgment creditor of the same debtor upon another claim, where the receivership has not extended to the pledgee's judgment. *Armstrong v. McLean*, 153 N. Y. 490. Where the debtor conveys his real property to a receiver the title is in the latter, subject only to the debtor's right to compel an accounting ; such right passes to the debtor's personal representatives upon his death. *Graham v. Lawyers' Title Insurance Co.*, 20 App. Div. 440, 46 Supp. 1055.

The receiver takes title to endowment policies payable to the debtor of his estate. *Reynolds v. Aetna Insurance Co.*, 28 App. Div. 591, 51 Supp. 446. A receiver cannot recover judgment for more of the proceeds of a fraudulent conveyance than equals the judgment he represents together with the expenses of receivership and reference. *Stiefel v. Berlin*, 28 App. Div. 103, 51 Supp. 147, 27 Civ. Pro. 216. By virtue of subdivision 4 of this section, the section does not affect the title of a purchaser in good faith without notice and for a valuable consideration, or for the payment of a debt in good

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faith and without notice, and therefore when overdue notes, owned by a judgment debtor, are purchased from him in good faith, the title of the transferee is superior to the lien of a judgment creditor and superior to the title of a receiver in supplementary proceedings. Even though before the transfer an injunction order had been served upon the debtor. *Matter of Clover*, 8 App. Div. 556, 40 Supp. 886. In determining whether the purchaser of notes for a valuable consideration and without notice of the pendency of supplementary proceedings against the holder was a purchaser in good faith within the exception of the statute as to the relation back of the title of the receiver, the fact that the notes were past due is at most a circumstance to be considered on that question and the rule of the law merchant is not controlling. *Matter of Clover*, 154 N. Y. 443, 48 N. E. Rep. 892, affirming 8 App. Div. 556, 40 Supp. 886. A receiver should not be removed on the ground of non-residence, unless one qualified to act is substituted in his place. *Terry v. Bange*, 30 St. Rep. 285, 9 Supp. 311, 18 Civ. Pro. 288, 57 Super. Ct. 546.

SUB. 3. RECEIVER SUBJECT TO CONTROL OF COURT. § 2471.

§ 2471. Receiver to be subject to control of court.

A receiver, appointed as prescribed in this article, is subject to the direction and control of the court out of which the execution was issued. Where an order has been made, extending a receivership to a special proceeding founded upon a subsequent judgment, the control over, and direction of, the receiver, with respect to that judgment, remain in the court to whose control and direction he was originally subject.

A motion to set aside an order appointing a receiver is properly made to the court and not to a judge. *Lippincott v. Westray*, 6 Civ. Pro. 74. As to power of judge to accept resignation of receiver, see *Wing v. Dissé*, 15 Hun, 190, and § 715, which provides for such a contingency. The rule under the old Code was that where the receivership had been extended the receiver would be subject to the control of the court upon whose execution he was first appointed. *Binks v. Potter*, 21 How. 469. After appointment authority of a judge over receiver ceases, and he can only be compelled to account by the court. *Pool v. Safford*, 14 Hun, 369; *Tillotson v. Wolcott*, 48 N. Y. 188; *Lane v. Lutz*, 1 Keyes, 203. *Contra*, *Webster v. Hobbie*, 13 How. 382.

Where it does not appear in what court the judgment was taken in the suit in which the receiver was appointed, or out of what

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court the execution thereon was issued, there is no jurisdiction shown in the court of the fund or the receiver. *Gelston v. Syracuse Savings Bank*, 29 Hun, 594. The court will control the action of the receiver as to the disposition of the property which comes into his hands. *Wardell v. Leavenworth*, 3 Edw. 244. But it will not enjoin the receiver from taking possession of the debtor's property in a separate action. *Van Rensselaer v. Emery*, 9 How. 135. Nor to pay over trust funds to the creditors. *Genet v. Fowler*, 18 How. 50. Or to distribute funds for which he may be held liable. *Morris v. Hiler*, 57 How. 322. The court will only entertain an application for the removal of a receiver on notice. *Bruns v. Stewart, etc., Co.*, 31 Hun, 195; *Rogers v. Corning*, 44 Barb. 229. The employment of the debtor as his agent to make collections is not ground for removal. *Ross v. Bridge*, 24 How. 163. An order removing a receiver on the ground of collusion with the judgment debtor is not appealable to the Court of Appeals. *Connolly v. Kretz*, 68 N. Y. 620. It was held in *Branch v. Harrington*, 49 How. 196; *Cummings v. Egerton*, 9 Bosw. 484, that the receiver should not employ the attorney of the judgment creditor. These decisions are overruled by *Baker v. Van Epps*, 60 How. 79. The receiver is bound to restore the surplus after payment of judgments he represents to the debtor. *Manning v. Monaghan*, 23 N. Y. 585; *Becker v. Torrance*, 31 id. 63; *Lanigan v. Mayor*, 70 id. 454; *Goddard v. Stiles*, 90 id. 199. He cannot be sued without permission of the court. *Noc v. Gibson*, 7 Paige, 513; *Parker v. Bruning*, 8 id. 388; *Taylor v. Baldwin*, 14 Abb. 166; *Riggs v. Whitney*, 15 Abb. 388; *De Groot v. Joy*, 30 Barb. 483. The rights, powers, and duties of a receiver are nearly analogous to those of a receiver appointed by the Court of Chancery on a creditor's bill. *Petition of Inglehart*, 1 Sheldon, 514. If a conveyance is necessary to enable a receiver to acquire title or possession to property, the court which has jurisdiction of the judgment debtor may compel him to make such conveyance. It has this inherent power. *Chautauqua Bank v. Riscley*, 19 N. Y. 374.

The authority of the Supreme Court extends to all proceedings in an action, and therefore includes supplementary proceedings. Thus the Supreme Court has power in the appointment of the receiver by the county judge to make an order for the delivery of property of the debtor to such receiver. *Matter of Crane*, 81

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Hun, 96, 62 St. Rep. 549, 30 Supp. 616. An order of the county court which directed a receiver in supplementary proceedings to sell a cause of action of the debtor upon which the attorney had a prior lien greater than the amount of the judgment will be reversed. It was held, however, that the receiver might apply to be made a party to the action brought on such cause of action. *Matter of Patterson*, 12 App. Div. 123.

The city court of New York cannot remove a receiver in supplementary proceedings appointed by the Supreme Court. *Garfield National Bank v. Bostwick*, 39 St. Rep. 358, 14 Supp. 919. When a receiver has collected the judgment he was appointed to collect, his duties are at an end. *Gifford v. Rising*, 59 Hun, 42, 35 St. Rep. 695, 12 Supp. 428.

As a very thorough discussion of the practice in supplementary proceedings, attention is called to the case, 94 N. Y. 31, frequently cited, which settles very many questions as to the regularity of the proceedings and the rights of the receiver, and determines that the proceeding is not one in which jurisdiction must be proved whenever questioned in a collateral proceeding, but is a remedy in a court of general jurisdiction, where the acts of the officers named are entitled to all the presumptions of regularity which belong to proceedings in courts of general jurisdiction. The attention of the practitioner is called to the fact that, under this title, as well as many others, very many cases decided before the enactment of the Code are overruled or rendered obsolete by the changed language of the present Code. No attempt has been made to determine in each instance what changes are effected by the language used in the revision. Where it is apparent, no explanation is needed. Where it is doubtful, it remains for the courts to determine the extent and character of the change, and in each particular case the practitioner will be obliged to determine whether a case cited applies to the changed conditions of the particular statute affected by it.

CHAPTER XXV.

PROCEEDINGS TO COMPEL THE DELIVERY OF BOOKS TO A PUBLIC OFFICER.

§ 2471a. [Added, 1893.] Delivery of books and papers, how enforced.

A public officer may demand, from any person in whose possession they may be, a delivery to such officer of the books and papers belonging or appertaining to such office. If such demand is refused, such officer may make complaint thereof to any justice of the Supreme Court of the district, or to the county judge of the county in which the person refusing resides. If such justice or judge be satisfied that such books or papers are withheld, he shall grant an order directing the person refusing to show cause before him at a time specified therein, why he should not deliver the same. At such time, or at any time to which the matter may be adjourned, on proof of the due service of the order, such justice or judge shall proceed to inquire into the circumstances. If the person charged with withholding such books or papers makes affidavit before such justice or judge that he has delivered to the officer all books and papers in his custody which, within his knowledge, or to his belief, belong or appertain thereto, such proceedings before such justice or judge shall cease, and such person be discharged. If the person complained against shall not make such oath, and it appears that any such books or papers are withheld by him, such justice or judge shall commit him to the county jail until he delivers such books and papers, or is otherwise discharged according to law. On such commitment such justice or judge, if required by the complainant, shall also issue his warrant, directed to any sheriff or constable, commanding him to search, in the daytime, the places designated therein, for such books and papers, and to bring them before such justice or judge. If any such books and papers are brought before him by virtue of such warrant, he shall determine whether they appertain to such office, and if so shall cause them to be delivered to the complainant.

L. 1893, ch. 179.

The provisions of § 2471a of the Code Civil Procedure, to compel the delivery of books or papers of a public office are substantially the same as those under the Revised Statutes (1 R. S. 125, § 51), and are not intended to furnish a method for trying title to office. *Matter of Sells*, 15 App. Div. 574.

Nearly all of the decisions relative to proceedings to compel the delivery of books and papers arose under the provisions of the Revised Statutes; but as the present provisions of the Code are practically the same as those of the Revised Statutes, the decisions under the latter are here given in the belief that they will be applicable under the present section.

Proceedings under the Revised Statutes (1 R. S. 125, § 51) were not proceedings to try title to office. This statute provides

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that if any person shall refuse or neglect to deliver over to his successor any books or papers pertaining to a public office, such successor might make a complaint to the chancellor, or any justice of the Supreme Court, or a circuit judge, or the first judge of the county, who, upon being satisfied by oath of the complaint and other testimony as is offered, that any such books or papers are withheld, should grant an order directing the person so refusing to show cause before him within some short or reasonable time why he should not be compelled to deliver the same. Art. V., chapter 5, part 1, of the Revised Statutes, provides for the practice in compelling the delivery of such books and papers, and the present § 2471a of the Code seems to be a condensation and partial re-enactment of the aforementioned provision of the Revised Statutes.

It was held, in the *Matter of Bradley*, 141 N. Y. 521, which arose under the Revised Statutes, that all the petitioner was required to establish in order to maintain the proceedings is that he was elected and has duly qualified, and the question as to the validity of the election could not be determined in such a proceeding. Where, therefore, under a proceeding by one who had received a certificate of election to the office of supervisor of a town, and had filed his undertaking, which had been approved by town board, it was objected that illegal votes had been counted for the applicant, and that he had not been elected by a majority of the legal ballots, and also that his predecessor had not been notified and was not present at the meeting of the town board when the applicant's undertaking had been approved, it was held that such objections were not tenable and that the application for the delivery of moneys, books, papers, etc., belonging to such office were properly granted.

It was also held under the Revised Statutes that while proceedings to compel the delivery of books and papers by a public officer to his successor, the title to the office, where there are adverse claims, cannot be tried, yet the party in possession of such books cannot retain the same on frivolous grounds or such as create no warranted doubt as to the right of the applicant. *Matter of North v. Carcy*, 4 T. & C. 357. It was held in *Matter of Bagley*, 27 How Pr. 151, that if the applicant established a legal right to the books and papers the relief claimed should be granted, and should not be denied because the validity of the appointment

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was contested. It was held that one who is a public officer *de facto* was entitled to an order for delivery of books and papers, although he was excluded forcibly from the office. *Conover's Case*, 5 Abb. Pr. 73; *contra*, *Devlin's Case*, 5 Abb. Pr. 281. Under the Revised Statutes it was held that the provisions apply to collector of tolls on the canal as well as to other officers, and this although different proceedings against certain canal officers were given by statute contemplating the same remedy. It was held that the two remedies were concurrent. *Cobee v. Davis*, 8 How. Pr. 367. It was also held that an application to compel the delivery of books or papers pertaining to a public office was not a motion in court, but an application to a justice out of court. Neither was it a motion in any suit. Therefore, it was not restricted to counties adjacent to the residence of the party, and hence any justice of the court had jurisdiction. *Welch v. Cook*, 7 How. Pr. 282.

It was early held under the Revised Statutes, in conformity with the decision in *Matter of Bradley*, 141 N. Y. 529 (*supra*), that the title to office should not be tried in the application for books and papers, and should be determined in an action in the nature of a *quo warranto*, but that one only in actual possession of the office can invoke the proceedings for the possession of books or papers. *Conover's Case*, 5 Abb. Pr. 73. To compel the delivery of books or papers the applicant's title to the office must be clear. *Matter of Hodgkinson*, 5 Hill, 631, n.; *Conover's Case*, 5 Abb. Pr. 773; *Devlin's Case*, 5 Abb. Pr. 281. Where the title is clear and the defendant not in possession under color of title or by lawful right the application should be granted. *Matter of Whitney*, 2 Barb. 513.

If the defendant be an officer *de facto* the applicant's title must be clear and free from any reasonable doubt, and if not so the warrant is void for want of jurisdiction. *Prima facie* evidence of such title is sufficient, and the magistrate will not go behind the regular certificate of election, nor will he inquire into any irregularity. *Matter of Baker*, 11 How. Pr. 418. It was held that the proceedings under the Revised Statutes did not apply to a case where there is a real question to the title of an office and no possession to any practical purpose by the party instituting the proceedings. It was held that one in possession of an office with claim or color of title should have the custody

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of the books or papers, and one out of possession and making no attempt to perform the official duties, should not have the books or papers until his right was established. *Matter of Davis*, 19 How. Pr. 323, citing 6 Hill, 616, 14 Barb. 396, 24 Barb. 587.

Under proceedings to obtain books and papers of a public office, brought under § 428 of the Code of Procedure, they should be held until judgment of ouster is entered against the person executing the duties of the office. *Matter of Welch*, 14 Barb. 396; s. c. 7 How. Pr. 173. If the petitioner alleges such a judgment the opposing affidavits may deny it. *Id.* The nature of the proceedings under the Revised Statutes are discussed in *People v. Peabody*, 5 Abb. Pr. 594. Under the Revised Statutes it was held that although the title to office could not be tried in these proceedings, that it was nevertheless the duty of the judge to examine the facts and claims of the respective parties so as to ascertain whether the person claiming office and delivery of books or papers shows a clear right thereto, and whether the person refusing the delivery established a reasonable doubt as to the right of the applicant. *North v. Carey*, 4 T. & C. 357, followed in *People v. Allen*, 51 How. Pr. 97.

While the applicant, under Revised Statutes, where neither party claims the office, has legal evidence of his election, the court had no power to inquire into the question and to determine and return the result. *Casey v. Campbell*, 16 Abb. N. C. 369, 21 How. Pr. (N. S.) 85. It was held under the Revised Statutes that the proceedings apply to the office of town clerk. *Matter of Bagley*, 27 How. Pr. 151. Where one refused possession of the books and papers in good faith and in the belief that he was the lawful incumbent, that his conduct could not be deemed wilful or obstinate. It was only where the conduct in withholding the papers is wilful and obstinate that the summary remedy of the statute would be invoked. *Bridgman v. Hawe*, 16 Abb. N. C. 272. It seems in the case last cited that the provisions of the Revised Statutes apply only to public officers of the State, and not to officers of municipalities, or city, town, or municipal officers of cities created by special charter.

A mayor and his clerk in possession of the books and papers pertaining to the office of a city fire marshal illegally attempted to be removed by such mayor, and whose illegal appointee resigned before actual ouster, may be compelled under § 2471a of

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the Code Civil Procedure, to surrender to the prior and legal incumbent, the books and papers of the office; the key to which had been left with the mayor and his clerk by the illegal appointee when he resigned. *Matter of Freeman*, 23 Misc. 752, citing *Matter of Bradley*, 141 N. Y. 527; *Matter of Sells*, 15 App. Div. 571.

Affidavit. (15 App. Div. 571.)

NEW YORK SUPREME COURT—SECOND JUDICIAL DISTRICT.

In the Matter of the Application

of

John F. Sells.

CITY OF YONKERS, }
COUNTY OF WESTCHESTER, } ss. :

John Sells being duly sworn deposes and says :—That he is 21 years of age and upwards, and a citizen of the United States, and resides in the city of Yonkers, in the county of Westchester, New York.

That the term of office of Howard Kinch, heretofore appointed commissioner of jurors in the county of Westchester, expired on the second Monday in May, in the year 1896, and he continued to hold over pending the appointment of a successor.

That on the 16th day of January, 1897, at a meeting duly held and which was attended by the county treasurer, the sheriff, and the district attorney of Westchester County, and the county judge of Westchester County, deponent was duly appointed to the office of commissioner of jurors in the county of Westchester.

That thereafter, and on the 18th day of January, 1897, deponent took the constitutional oath of office before an officer authorized to take the same and duly filed the same in the office of the clerk of the county of Westchester.

That thereafter, deponent duly executed with the American Surety Company as surety a bond in the penal sum of five thousand dollars (\$5,000) conditional for the faithful performance of the duties of his office and the accounting for and paying over all moneys which might come into his hands by virtue thereof, and that deponent caused said bond to be approved by the chairman of the board of supervisors of Westchester County, and filed with the clerk of the board of supervisors on the 6th day of February, 1897.

That thereafter, and on the 9th day of February, 1897, deponent demanded of said Howard Kinch the possession of the office of commissioner of jurors in the county of Westchester, and that said Kinch then and there promised and agreed to surrender said office on the morning following, February 9, 1897.

That on the 10th day of February, 1897, deponent's representative

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called upon said Howard Kinch and demanded the office of commissioner of jurors, in the county of Westchester, and all the books and papers appertaining thereto, but that said Kinch refused to deliver up said office and the books and papers appertaining thereto.

That on the 16th day of February, 1897, deponent served upon said Kinch a written demand for the books and papers appertaining to the office of commissioner of jurors in the county of Westchester, and that said Kinch refused to deliver the same to deponent, stating that there was a legal question to be settled by the court first. A copy of which said statement is hereto annexed and marked Exhibit A.

That deponent is the duly appointed commissioner of jurors in the county of Westchester entitled to hold the office, with its salary, for a term ending on the second Monday of May in the year 1901.

That deponent is informed and believes the circumstances in reference to the holding of the meeting of the officers charged with the duty of appointing a commissioner of jurors in the county of Westchester is as follows :

That in the latter part of the year 1896, Addison Johnson, sheriff of the county of Westchester, George C. Andrews, district attorney of the county of Westchester, made a demand upon Smith Lent, county judge of the county of Westchester, as deponent is informed and verily believes, to call a meeting of the officers charged with the duty of making an appointment of commissioner of jurors in the county of Westchester, but that said county judge neglected and refused so to do, although it was his duty to call such meeting pursuant to the act of the legislature providing for the appointment of a commissioner of jurors in the county of Westchester.

That thereafter in the early part of January, 1897, Francis M. Carpenter, county treasurer of the county of Westchester, Addison Johnson, sheriff of the county of Westchester, and George C. Andrews, district attorney of the county of Westchester, caused to be served a written demand upon said Smith Lent, county judge of the county of Westchester, to call a meeting of the officers whose duty it was to make the appointment of commissioner of jurors in the county of Westchester, but that said county judge ignored said notice and neglected and refused to call such a meeting. This statement is made on information derived from said county treasurer and deponent verily believes it to be true.

That thereafter the said county treasurer, sheriff, and district attorney caused to be served upon said county judge, a notice of a meeting of the officers charged with the duty of appointing a commissioner of jurors in the county of Westchester, to be held at the time and place in said notice mentioned for the purpose of appointing a commissioner of jurors in the county of Westchester. This statement is made on information derived from said officers and deponent verily believes the same to be true.

That in pursuance of said notice a meeting was held by said county treasurer, sheriff, and district attorney, which was adjourned from time to time until the 16th day of January, 1897, at 10 o'clock in the morning of that day.

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That said meetings were all held at the county court-house at White Plains, in the county of Westchester. That on the said 16th day of January, 1897, the said county judge was in the court-house sitting as county judge, and that upon the request of said county judge said meeting was adjourned until later in the day until he had finished his official duties.

That at about 11 o'clock on the said 16th day of January, 1897, the said county judge came into the room in which the three other officers were meeting and waiting for said county judge, and requested them to adjourn until the following Thursday.

That the three other officers refused to adjourn until the following Thursday for the reason, which was stated, that in case such adjournment was taken the act which had been introduced in the legislature, and which gave the sole power of the appointment of the commissioner of jurors to the county judge, would have been passed and their power would be at an end.

That then the said county judge requested that the adjournment be taken until the following Tuesday, and stated that he would then meet them for a conference, but would not attend a formal meeting, which request was not acceded to. That the county judge stated that if they would consent to the appointment of a certain person named by him that he would meet them, otherwise he would not.

The county judge then left the room, and the county treasurer, sheriff, and district attorney proceeded to appoint deponent commissioner of jurors in the county of Westchester under chapter 491 of the Laws of 1892, as amended by chapter 269 of the Laws of 1893.

That the Governor refused to sign the bill giving to the county judge the sole power of appointment, and therefore the act passed this year for that purpose was withdrawn. That hereto annexed is a copy of the certificate of the appointment of deponent as such commissioner of jurors in the county of Westchester signed by the county treasurer, sheriff, and district attorney and marked Exhibit B.

That also hereto annexed is a copy of the certificate signed by the clerk of the county of Westchester that deponent has taken (and filed) the constitutional oath of office. Marked Exhibit C.

That hereto annexed is a copy of the bond given by deponent, containing a copy of the approval of the chairman of the board of supervisors indorsed thereon. Marked Exhibit D.

That deponent is unable to state accurately what proceedings of the said officers charged with the appointment of the commissioner of jurors in the county of Westchester for the reason that the record of said proceedings is in the possession of E. R. Hopkins, clerk of the board of supervisors, and that deponent has not access thereto, and deponent desires that upon this application the said clerk of the board of supervisors shall be directed to produce all the records of the officers charged with the duty of appointing the commissioner of jurors in the county of Westchester relating to the appointment and meeting held for the appointment of such commissioner of jurors in Westchester County so that the court may have full and complete information in respect thereto.

That said Howard Kinch is now holding the office of commis-

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sioner of jurors in the county of Westchester illegally and unlawfully and in violation of the rights of deponent, who is entitled to be put in possession of the books and papers appertaining to such office, he being legally appointed the commissioner of jurors in the county of Westchester for the term expiring on the second Monday in May, 1901.

No previous application has been made for an order, and the reason that a shorter time than eight days' notice of motion is sought to be given is that deponent is entitled to the immediate possession of the books and papers above referred to, and it is his duty to exercise the functions of his office at once.

JOHN SELLS.

(*Verification.*)

Order to Show Cause. (15 App. Div. 571.)

NEW YORK SUPREME COURT—SECOND JUDICIAL DISTRICT.

In the Matter of the Application of John Sells,
as commissioner of jurors in the county of
Westchester, to compel the delivery to him
of the books and papers belonging or apper-
taining to such office of commissioner of
jurors in Westchester County and now in
possession of Howard Kinch.

Upon the annexed affidavits of John Sells, Addison Johnson, and Francis M. Carpenter, and the exhibits hereto annexed, marked A, B, C, and D.

Let Howard Kinch, now in possession of the books and papers appertaining to the office of commissioner of jurors in the county of Westchester, show cause before me at a Special Term of this court appointed to be held at the city of Poughkeepsie on the 20th day of February, 1897, at the opening of court on that day, why he, the said Howard Kinch, should not deliver to John Sells as commissioner of jurors the books and papers appertaining to that office; and also

Let E. R. Hopkins, clerk of the board of supervisors, produce upon the hearing in this motion at the time and place aforesaid the books and papers in his possession which have any entries in relation to the appointment of said John Sells as commissioner of jurors; and

Let service of this order on or before February 19th inst. be deemed good and sufficient service.

J. F. BARNARD,

Justice of Supreme Court.

It is held under the present § 2471a of the Code that upon the applicant's producing his certificate of election or appointment to the office in question from the proper officer, with proof that he has duly qualified, entitles him to the delivery of the books and papers pertaining to the office. But it seems that if the facts

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presented show any doubt or show that the election or appointment was void, a departure from the rules would be justified. *Matter of Sells*, 15 App. Div. 572. Under the provisions of the Revised Statutes, § 52, a person charged with holding books or papers must make an affidavit before an officer hearing the proceedings that he has duly delivered to his successor all of such books or papers, and under that section it was held that an affidavit of a prior incumbent in office made before a notary and alleging that he had delivered each and every book or paper in his possession or under his control as supervisor, within his knowledge, in any way belonging to or pertaining to the office of supervisor, was fatally defective in having been made before a notary public instead of before the justice granting the order, as required by § 52 that such an affidavit did not require the dismissal of the proceedings or discharge of the defendant. *Matter of McGlory*, v. *Henderson*, 43 Hun, 439. It should be noted that the present § 2471a makes the following provisions: "If the person charged with withholding such books or papers makes an affidavit before such justice or judge that he has delivered to the officer all books and papers in his custody which, within his knowledge, or to his belief, belong or appertain thereto, such proceeding before such justice or judge shall cease, and such person be discharged." It would seem, therefore, that the decision in *Matter of McGlory* v. *Henderson* (*supra*) was applicable to proceedings under this present section.

It is held under § 2471a of the Code that in a special proceeding instituted thereunder to obtain an order directing petitioner's predecessor in office to deliver to him the official books and records of the office of city clerk, proof on the part of petitioner that he had the prescribed certificate of appointment from the proper officer and had taken the oath of office and had filed the same and had given the necessary undertaking, did *prima facie*, if not absolutely, establish his right to the books and papers pertaining to the office. *Matter of Dudley*, 33 App. Div. 466; see same case below, 24 Misc. 279.

The fact that the person has received a certificate of election and taken the oath of office is sufficient to entitle him to the books and papers. *Matter of Foley*, 8 Misc. 196, 58 St. Rep. 826, 28 Supp. 611. In this case it is also held that the title to office cannot be tried in these proceedings. Also, that an attempt to

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file the oath of office within the prescribed time is a sufficient compliance with the statute. A *prima facie* title to office, evidenced by election or appointment valid on its face, is sufficient to entitle a party to the records of the office. *People ex rel. Salisbury v. Holcomb*, 5 Misc. 459, 26 Supp. 230. An application under the Revised Statutes for the delivery of books or papers could not be defeated by the mere allegation that there was a dispute as to the title to the office, but to defeat the same there must appear from the record a reasonable ground for the dispute. *People ex rel. Smith v. Barrett*, 29 St. Rep. 159, 8 Supp. 677. The decision of a judge in proceedings under the Revised Statutes was conclusive upon the rights to the parties and their privies. *Conover v. Mayor*, 5 Abb. Pr. 293. The issuing of the warrant under the Revised Statutes after the decision that the applicant was entitled thereto was held to be a ministerial and not a judicial act, and could be stayed by *certiorari*. *Conover's Case*, 5 Abb. Pr. 182, 26 Barb. 429. It was held, under Rev. Stat., that after a stipulation that no execution or other proceeding should be taken in an action to oust defendant from public office until ten days after notice of judgment should be served, that the relator, in proceedings for possession of books and papers, could not enforce the same until the ten days had expired. *Matter of Welch*, 14 Barb. 396, 7 How Pr. 173.

Order. (15 App. Div. 571.)

At a Special Term of the Supreme Court held at the court-house in the city of Poughkeepsie, N. Y., on the 6th day of March, 1897:

Present :—Hon. Joseph F. Barnard, *Justice*.

In the Matter of the Application of John Sells.	}

Complaint having been made to me by John Sells, commissioner of jurors of Westchester County, to compel the delivery to him of the books and papers appertaining to such office and in the custody of Howard Kinch, and proof having been presented which satisfied me that such books and papers were withheld by said Howard Kinch, and an order having been granted by me, directed to the said Howard Kinch, to show cause before me on the 20th day of February, 1897, at the court-house in the city of Poughkeepsie, N. Y., why he should not deliver the same over to said John Sells, and on the return day the said Howard Kinch having duly appeared in person and by Wm. P. Platt, his attorney, and in his answer

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to said complaint filed the affidavit of Howard Kinch, verified Feb. 19, 1897, of Smith Lent, verified Feb. 19, 1897, and of Edward Hopkins, verified on the 19th day of February, 1897, denying the right of the said John Sells as commissioner of jurors, and proof having been submitted to me of due service of an order, and upon adjournment duly had I did proceed to inquire into the circumstances, and upon said inquiry I find that said John Sells became commissioner of jurors on the 16th day of January, 1897, and that the said Howard Kinch has in his custody the books and papers appertaining to such office, and that the said Howard Kinch upon demand duly made has refused and still refuses to deliver to the said John Sells, commissioner of jurors in the county of Westchester as aforesaid, the said books and papers :

Now, upon reading and filing the order to show cause herein, with the affidavits thereto annexed, to John Sells, Addison Johnson, and F. M. Carpenter, and exhibits A, B, C, and D thereto annexed ; exhibit A, being the demand in writing, dated February 16th, 1897, for such books and papers, and a duly certified notice of John Sells, of his appointment as commissioner of jurors, dated January 16th, 1897, and certificate of the county clerk of Westchester County showing the filing in his office of the constitutional oath of office of said John Sells as commissioner of jurors, the bond of said John Sells with the approval indorsed thereon of G. W. Davenport, chairman of the board of supervisors of Westchester County, and all of which were prior to the hearing herein made part of this complaint to me, and duly served upon said Howard Kinch, and upon reading and filing the affidavits of Howard Kinch, Smith Lent, and G. K. Hopkins, verified Feb. 19th, 1897, and the testimony of the witnesses taken before me on the 25th day of February, 1897, and it appearing that the books and papers appertaining to the office of commissioner of jurors in the county of Westchester are withheld by the said Howard Kinch aforesaid, from the said John Sells, as commissioner of jurors, it is hereby

Ordered, that said Howard Kinch be committed to the county jail of Westchester County until he delivers all the books and papers appertaining and belonging to such office of commissioner of jurors aforesaid to John Sells, commissioner of jurors aforesaid, or until he is otherwise discharged according to law, with \$50 costs and disbursements.

Enter in Westchester County.

J. F. BARNARD,
Justice Supreme Court.

Indorsed:—"Granted at the above named Special Term—the clerk of Westchester County will enter."

"THEO. A. HOFFMAN,"
"Clerk."

For the requisites of the warrant of arrest and search warrant, under the Revised Statutes, see *Devlin's Case*, 5 Abb. Pr. 281.

CHAPTER XXVI.

PROCEEDINGS FOR THE CONDEMNATION OF REAL PROPERTY.*

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* This subject is treated in Mills on Eminent Domain, Randolph on Eminent Domain, Lewis on Eminent Domain, and American and English Encyclopedia of Law.

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ARTICLE I.

EMINENT DOMAIN AND HOW EXERCISED.

SUB. 1. RIGHT OF EMINENT DOMAIN.

2. CONSTITUTIONAL AND STATUTORY PROVISIONS REGULATING THE RIGHT.
§ 7, Art. I., Constitution.

SUB. 1. RIGHT OF EMINENT DOMAIN.

“Eminent Domain is defined to be the right of a State to take private property for public use on payment of compensation.” Randolph on Eminent Domain, § 2, citing Vattel, Law of Nations, § 244; Grotius, Rights of War and Peace, book 3, chap. 20, § 7, to the following definition: “The property of the subject is under the dominion of the State, so that the State, or he who acts for it, may use, and even alienate and destroy such property, not only in case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done, the State is bound to make good the loss to those who lose their property, and to this public purpose, among others, he who has suffered the loss must, if need be, contribute.”

Eminent domain is that sovereign power vested in the people by which they can, for any public purpose, take possession of the property of any individual upon just compensation paid to him. Am. & Eng. Enc. Law., vol. 10 (2d ed.), p. 1047. Just compensation must be made to the owner. *West River Bridge Co. v. Dir.* 47 U. S. (6 How.) 507; *Garrison v. N. Y. City*, 88 U. S. (21 Wall.) 196. It is said in *Cherokee Nation v. Southern Kansas R. R.*, 135 U. S. 641, that “lands held by private owners every-

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where within the geographical limits of the United States are held subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it." And the United States has, under the right of eminent domain, condemned property for military purposes, water supply, postoffices, coast survey, light-houses. *United States v. Chicago*, 7 How. 185, and cases cited, Randolph on Eminent Domain, § 31.

Each State has the right of eminent domain by virtue of its statehood, whether that statehood be self-created by treaty, or confirmed by Federal authority. *Huse v. Glover*, 119 U. S. 543; *Illinois Central R. R. v. Illinois*, 146 U. S. 387. The power of eminent domain is exercised by municipal corporations in taking property for public parks and highways, by railroad companies for passenger stations and approaches thereto, engine-houses, warehouses and cattle-yards, shops, and for other purposes incidental and necessary to the business of the company. *In re N. Y. C. & H. R. R. Co.*, 77 N. Y. 248; *In re N. Y. C. & H. R. R. Co. v. Metropolitan Gas Light Co.*, 63 N. Y. 326.

The limitation of the power in that respect is laid down in *Rennselaer & Saratoga R. R. Co. v. Davis*, 43 N. Y. 137; *N. Y. & H. R. R. Co. v. Kipp*, 46 N. Y. 546; *N. Y. & C. R. R. Co. v. Gunnison*, 1 Hun, 496. For canal purposes, *Rogers v. Bradshaw*, 20 Johns. 735; *Steele v. Inland Navigation Co.*, 2 Johns. 283; *Jackson v. Daley*, 5 Wend. 526. Eminent domain may be exercised for water works for the supply of villages and cities. *Mayor of New York v. Bailey*, 2 Den. 433; *Gardner v. Newburgh*, 2 Johns. Ch. 162. For the laying of gas-pipes, *In re Bloomfield & R. Nat. Gas Light Co. v. Richardson*, 63 Barb. 437; *In re Deering*, 93 N. Y. 361.

The right of eminent domain extends not only to public highways, but to private roads; and where land is condemned under the right of eminent domain, it includes any right or easement connected with it, belonging to the land. *Williams v. N. Y. C. R. R.*, 16 N. Y. 97; *Arnold v. H. R. R. Co.*, 55 N. Y. 661. And the right of eminent domain may be exercised over the reversion. *Heard v. Brooklyn*, 60 N. Y. 242. The right to use water and power. *Bank of Auburn v. Roberts*, 44 N. Y. 192. An easement over the lands of another. *People v. Haines*, 49 N. Y. 587. The right to use running water. *Gardner v. Newburgh*, 2 Johns. Ch.

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161. The property of a corporation is equally liable with the property of a private citizen, to be taken for public uses on the payment of just compensation. *Prospect Park and Concy Island Co. v. Williamson*, 91 N. Y. 552; but it is there laid down that lands once taken for public use pursuant to law under the right of eminent domain cannot, under general laws, and without special authority from the legislature, be appropriated by condemnation proceedings to a different public use.

A very full consideration is given as to the power of the State to exercise the right of eminent domain in *Beckman v. Saratoga & Schenectady R. R. Co.*, 3 Paige Ch. 45, by Chancellor Kent, holding that the eminent domain remains in the government, and it can resume the possession of private property, not only where the safety, but where the interest, or even the convenience, of the State is concerned, as where the land is wanted for a road, canal, or other public improvement, and subject to the restriction that the property cannot be taken for public use without just compensation to the owner, and under the mode prescribed by law. It is there held that railroads are public improvements from which the public derive a benefit, and with regard to which the power of eminent domain may be exercised. The latter question is considered in *Bloodgood v. Mohawk & H. R. R. Co.*, 18 Wend. 1. In *Buffalo & N. Y. R. R. Co. v. Brainard*, 9 N. Y. 100, Mason, J., delivering the opinion of the court, says: "Common-law right of eminent domain has ever been regarded as a high prerogative of sovereignty to be exercised whenever the public necessity required. And this right is impliedly admitted both in the Constitution of the State and of the United States. It belongs to the legislative power of the government to determine for what public purposes private property shall be taken, and the necessity or expediency of such appropriation.

It is held in the *Matter of Application of the Niagara Falls & Whirlpool Co.*, 108 N. Y. 375, that the question as to whether the uses to which property is sought to be put are in fact public, so as to exercise the right of eminent domain, is a judicial one to be determined by the courts. So long as the intended use of an improvement sought to be accomplished through an exercise of a right of eminent domain is not restricted to private parties or private interests, but is open to the whole public, it is no valid objection to the act authorizing it, that it will benefit one person or

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some class of persons more than others, or that it originated in private interests and was intended in some degree to subserve private purposes. *Matter of Petition of Burns*, 155 N. Y. 23.

The exercise of the power of eminent domain by the State cannot be limited. *Adirondack Railroad Co. v. Indian River Co.*, 27 App. Div. 326, 50 Supp. 245, 84 St. Rep. 245.

Section 7 of Article VII. of the Constitution prohibits the State from taking any land for the forest preserve subject to the right of a railroad corporation to operate its road over the same, and §§ 290 and 291 of chapter 488, Laws 1892, as amended by chapter 395, Laws 1895, and chapter 220, Laws 1897, were to the same effect. *Adirondack R. Co. v. Indian River Co.*, 27 App. Div. 326, 50 Supp. 245, 84 St. Rep. 245.

But a contemplated possible limited use by a few, and not then as a right, but by way of permission or favor, is not a public use, and so is not sufficient to authorize the taking of private property against the will of the owner. *Matter of the Application of the Split Rock Table Road Co.*, 128 N. Y. 408. Generally, whether the use to which private property may be devoted by legislative power is in fact public or private, is a judicial question, and the courts are not concluded by any declaration of the law making power, as to the nature of the use. *The Waterloo Woolen Mfg. Co. v. Shanahan*, 128 N. Y. 345.

In construing statutes authorizing the exercise of the power of eminent domain, a strict rather than liberal construction is the rule. This power is in derogation of the ordinary rights of private ownership and of the control which the owner usually has of his property, and it is proper to exact from the petitioner that he should fulfil and carry out all the conditions and restrictions imposed by legislative acts under which he proceeds. To sustain the exercise of eminent domain by a body which claims to be a corporation, and as such to exercise such right and to take the property of a citizen, it is not sufficient that it is a corporation *de facto*, it must be a corporation *de jure*. *Matter of N. Y. Cable Co.*, 104 N. Y. 1.

The legislature can delegate power to private corporations if carrying on business of a public nature, and may prescribe how the power may be exercised by them. Where provision is made upon the failure to obtain the consent of the property owners to institute proceedings before special tribunal, the determination of

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that tribunal when made within its jurisdiction, and upon proper notice, is conclusive upon all parties and cannot be questioned collaterally. *Matter of Union Elevated R. R. Co.*, 112 N. Y. 61, 20 St. Rep. 498, affirming 17 St. Rep. 630.

A railroad may acquire land outside of its proper route for the purpose of making connections with an intersecting road. *Matter of Brooklyn Elevated R. R. Co.*, 32 St. Rep. 1065, 11 Supp. 161. And may institute proceedings to condemn land after the road has been constructed. *Matter of Metropolitan R. R. Co.*, 12 Supp. 502.

By chap. 252, Laws 1884, the same power was conferred upon street railroads as upon general railroad corporations to take private property by condemnation. *Matter of Rochester Electric R. R. Co.*, 57 Hun, 56, 32 St. Rep. 1, 10 Supp. 379. An elevated railway company may maintain proceedings to condemn an easement in property of an abutting owner, notwithstanding the road has been constructed, and that the past use of easements, without compensation, may be deemed a continuing trespass. *Matter of Metropolitan Elevated R. R. Co. v. Dominick*, 55 Hun, 198, 27 St. Rep. 576, 8 Supp. 151. The legislature has no power by special act to authorize the sale of the property of parties, for other than public purposes, without their consent, and the facts which would create a necessity for the exercise of such power will not be presumed when neither shown by proof, nor recited in the act. *Powers v. Bergen*, 6 N. Y. 358.

The taking of private property for private purposes cannot be authorized even by a legislative act, and the fact that the structure intended to be built thereon intends incidentally to benefit the public by conferring additional accommodations for business, is not sufficient, if the structures are to remain under private ownership and control, and no use to their right or their management is conferred upon the public. *Matter of Eureka Ware House Co.*, 96 N. Y. 42. The mere fact that the land proposed to be taken for a public use is not needed for immediate purposes is not necessarily a defence to proceedings to condemn. *Matter of Staten Island Rapid Transit Co.*, 103 N. Y. 251.

It is competent for the legislature to authorize municipal corporations to take private property for public use without first making payment, provided adequate provision is made by which the owner can coerce compensation without reasonable delay.

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Kelley v. Mayor, 89 Hun, 246, affirming 6 Misc. 516, 56 St. Rep. 835, 27 Supp. 164. After the legislature has authorized the taking of property for public use upon certain conditions, it cannot abolish such conditions and act as if none had been attached. *Matter of Southern Boulevard R. R. Co.*, 58 Hun, 497, 35 St. Rep. 550, 12 Supp. 466. The owner's title is not divested until the proceedings are completed, nor is title acquired until confirmation of the report of the commissioners to assess damages. *Ryder v. Stryker*, 63 N. Y. 136, affirming 2 Hun, 115, 4 Supr. Ct. 399; *Matter of North Thirteenth Street*, 5 Hun, 175; *Ballou v. Ballou*, 78 N. Y. 325.

Where lands are taken for public use under the power of eminent domain, upon payment of their value to the owner of the fee, the public acquires absolute title divested of the wife's inchoate right of dower. *Moore v. New York*, 8 N. Y. 110; *Rexford v. Knight*, 15 Barb. 627. Where private property is taken for public purposes on payment of a just compensation, there is no reversionary estate in the representatives of the original owner, and the property so acquired may be converted to other purposes. *Heyward v. N. Y.*, 7 N. Y. 314; *Rexford v. Knight*, 11 N. Y. 308. When the State or a municipal corporation has acquired the absolute title to land for public use, which use has been discontinued, the title does not revert, but may be granted to individuals for private purposes. *Birdsall v. Carcy*, 66 How. 358. Although an appropriation for conveyance of land be for public use, and it be so expressed in the law authorizing the appropriation, or in the deed, this does not prevent the passage of the absolute title, so as to cut off all right of reversion to the former owner or the grantor. *Tift v. City of Buffalo*, 82 N. Y. 204. If the legislature requires resort to the agency of a court of record to determine the compensation to be made for the taking of lands, it must designate a court, which, with respect to the subject-matters and persons, is competent as possessing local jurisdiction over them. *Matter of City of Buffalo*, 139 N. Y. 422, 54 St. Rep. 692, affirming 46 St. Rep. 81, 18 Supp. 771.

The legislature has power to authorize a foreign railroad corporation, lawfully operating its road within this State, to acquire by condemnation additional lands required for railroad purposes. Such a corporation is, in the contemplation of the statutes of the State, and to the extent of its existence here, for those purposes,

a State corporation. The term "every railroad corporation," in the General Railroad Law, includes foreign railroad corporations, which, under authority of law, have extended and are operating their roads in this State, and under the former act, such a corporation had authority to acquire by condemnation, additional real estate, when needed for the proper operation of its road, and to meet the public demands of travel and traffic. *N. Y., N. H. & Hartford Railroad v. Welsh*, 143 N. Y. 411, 62 St. Rep. 429.

SUB. 2. CONSTITUTIONAL AND STATUTORY PROVISIONS REGULATING THE RIGHT.

§ 7, *Art. I., Constitution*.—"When private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law. Private roads may be opened in the manner to be prescribed by law, but in every case the necessity of the road and the amount of all damage to be sustained by the opening thereof shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceedings, shall be paid by the person to be benefited. General laws may be passed permitting the owners or occupants of agricultural lands to construct and maintain for the drainage thereof, necessary drains, ditches, and dykes upon the lands of others, under proper restrictions and with just compensation, but no special laws shall be enacted for such purposes."

See, also, Fifth Amendment Constitution United States.

Numerous statutory provisions have been enacted for the purpose of providing for compensation when private property is taken for public use, among them the following which relate to those matters in which condemnation proceedings are usually taken. General Municipal Law, constituting ch. 17 of the General Laws (ch. 685 of the Laws of 1892), contains the following provisions :

Section 22. A municipal corporation authorized by law to take and hold real property for the uses and purposes of the corporation may, if it is unable to agree with the owners for the purchase thereof, acquire title to such property by condemnation. Drainage Law, as amended Laws 1869, ch. 888, § 9, authorizes drainage commissioners under certain circumstances to procure title to easements by condemnation proceedings. Historical societies

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under Laws 1896, ch. 681, may acquire lands for the purpose for which they are organized by like proceedings. Under § 33 of the Insanity Law, ch. 28 of the General Laws, lands necessary for the use of State hospitals may be acquired by condemnation.

Under § 20a of the Highway Law, assessors may acquire by condemnation the right to take and use certain gravel for highway purposes. Membership Corporations Law, ch. 43 of the General Laws (§ 45 as amended Laws of 1896, ch. 325), provides that certain corporations organized for cemetery purposes may acquire lands exclusively for the purposes of the cemetery, no more than 200 acres in the aggregate, by condemnation proceedings. The Military Law, ch. 16 of the General Laws, provides for the acquiring of sites for armories by exercise of the right of eminent domain. Sections 174 and 175, and § 335a, Laws 1896, ch. 444, gives like authority to procure lands for the purposes of military roads, or other military purposes. Public Health Law, ch. 25 of the General Laws, by §§ 21, 72, confers the right of eminent domain for the purpose of carrying out the intention of the chapter.

State Law, § 37b., authorizes the Federal government to acquire any tract of land within the boundaries of this State for certain purposes stated in the preceding section, by, or on application to the Supreme Court, and for all lands condemned for the use and benefit of the United States, under the provisions of the statute, applying to condemnation of lands. The Transportation Corporation Law contains numerous provisions of like character. Article IV. gives such power to tramway corporations, Article V. to pipe-line corporations, Article VI. to electric light corporations, Article VII. to water works corporations, Article VIII. to telegraph and telephone companies, Article IX. to turnpike, plank road, and bridge corporations.

The Village Law, chapter 21 of General Laws, chapter 414 of Laws of 1897, §§ 222-223, provides for the exercise of the power of eminent domain by villages in order to acquire an existing system of water works where an agreement cannot be made with the owners of the system for its purchase, and for the acquiring of lands, streams, water, or water rights necessary for the establishment of the system of water works.

The Railroad Law, chapter 39 of the General Laws, contains numerous provisions for the exercise of the power of eminent domain by railroad corporations. Section 7 provides that all the

Art. I. Eminent Domain and How Exercised.

real property required by any railroad company or corporation for the purpose of its incorporation shall be deemed to be required for public use, and provides for the acquiring of title by condemnation proceedings in cases specified. Section 8 authorizes the acquiring of title by condemnation of lands belonging to the State. Section 11. authorizes the acquiring of the right to cross or occupy highways by condemnation. Under Article IV. of the Railroad Law, street surface railroads are authorized to institute condemnation proceedings under certain circumstances therein provided.

Numerous statutes exist authorizing foreign bodies and corporations to acquire property for different public uses, under the statute allowing the condemnation of real property. The principal cases in which the statutes authorize condemnation of property for public purposes are as follows: Telegraph and telephone corporations, under § 102 of Transportation Corporation Law, are authorized to take proceedings under the Condemnation Law as follows:

Construction of Lines.—Such corporation may erect, construct, and maintain the necessary fixtures for its lines upon, over, or under any of the public roads, streets, and highways, and through, across, or under any of the waters within the limits of this State, and upon, through, or over any other land, subject to the right of the owners thereof to full compensation for the same. If any such corporation cannot agree with such owner or owners upon the compensation to be paid therefor, such compensation shall be ascertained in the manner provided in the Condemnation Laws, § 102, p. 3276, of Birdseye, R. S.

Similar powers are conferred on turnpike, plank road, and bridge corporations under § 125 of the same statute which follows:

Possession of and Title to Real Estate.—The route so laid out and surveyed by the commissioners shall be the route of the road, and the corporation may enter upon, take, and hold for the purposes of its incorporation the lands described in such survey as necessary for the construction of its road and requisite buildings and gates. If for any cause the owner of any of such lands shall be incapable of selling the same, or his name or residence cannot, with reasonable diligence, be ascertained, or the corporation is unable to agree with the owner for the purchase thereof, it may acquire title thereto by condem-

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nation. Sec. 125, Transportation Cor. Law, Birds. R. S. p. 3280. Same article, by § 42, authorizes pipe-line corporations to acquire title by condemnation.

Condemnation of Real Property.—In case such corporation is unable to agree for the purchase of any real estate required for the purposes of its incorporation, and its line of pipe in the county in which such real estate is situated has been finally located, it shall have the right to acquire title thereto by condemnation, but such corporation shall not locate or construct any line of pipe through or under any building, dooryard, lawn, garden, or orchard, except by the consent of the owner thereof, in writing, duly acknowledged, nor through any cemetery or burial ground, nor within one hundred feet of any building, except where such line is authorized by public officers to be laid across or upon any public highway, or where the same is laid across or upon any turnpike or plank road. No pipes shall be laid for the purpose of carrying petroleum, gas, or other products or property through or under any of the streets in the cities of this State unless such corporation shall first obtain the consent of a majority of the property owners on the streets which may be selected for the laying of pipes, and such pipe-line shall be located with all reasonable care and prudence, so as to avoid danger from the bursting of the pipes. Sec. 42, Trans. Cor. Law, p. 3263 of Birds. R. S.

Tramway corporations are given like powers under § 32 of the Trans. Cor. Law, as follows:

May Acquire Land by Condemnation.—In case any such corporation is unable to agree for the purchase, use, or lease of any real property required for the purpose of its incorporation, it shall have the right to acquire title to the same by condemnation. Sec. 32, Trans. Cor. Law, p. 3261, Birds. R. S.

Under Article VII. of Trans. Cor. Law, §§ 80–85, authority is given for the incorporation of water works corporations, and provisions made for their supplying municipalities, is as follows:

Condemnation of Real Property.—Any corporation organized under this article shall have the right to acquire real estate, or any interest therein necessary for the purposes of its incorporation, and the right to lay, relay, repair, and maintain conduits and water pipes, with connections and fixtures, in, through, or over the lands of others; the right to intercept and divert

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the flow of waters from the lands of riparian owners, and from persons owning or interested in any waters, and the right to prevent the flow of drainage of noxious or impure matters from the lands of others into its reservoirs or sources of supply. If any such corporation which has made a contract with any city, town, or village, or with any of the inhabitants thereof, for the supply of pure and wholesome water, as authorized by § 81 of this article, shall be unable to agree upon the terms of purchase of any such property or rights, it may acquire the same by condemnation. But no such corporation shall have power to take or use water from any of the canals of this State, or any canal reservoirs, as feeders, or any streams which have been taken by the State for the purpose of supplying the canals with water. Sec. 84, Trans. Cor. Law, p. 3275, Birds. R. S.

Under the Military Act, real property may be condemned for troops or camping-grounds, etc.

Certain corporations formed for that purpose are authorized to condemn lands which they are desirous to use for the purpose of working mines:

Entry by Corporation to Work Mines.—Corporations formed for the purpose of working, and having lawful authority to work mines found within this State, may acquire the right and easement to enter upon and break up lands necessary for the operation of such mines, and if the written consent of the person in or upon whose lands such mine or mines are found shall be refused, or cannot be obtained by agreement, or by reason of the infancy or absence of such person from the State, or other legal disability of the owners of such lands, every such corporation may acquire such right and easement by condemnation, which right and easement when so acquired shall be deemed to have been so granted for a public use and for the public purpose of obtaining minerals reserved to the State. Before instituting any proceeding for such condemnation, the corporation shall file with the commissioners of the land office a full description of the location of such lands and obtain a grant of the right to acquire such right and easement from such commissioners, who are authorized to make the same and fix the terms thereof. Sec. 85, Public Lands Law, p. 2493, Birds. R. S.

Like provision is made for the acquisition of school-house sites, under § 219 of the Consolidated School Law:

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Section 219. Acquisition of Lands for Sites. Procedure.—Land for the site of a school-house in any school district, or additional land adjoining to and for the enlargement of an established site in any school district, not exceeding one acre, may be acquired in cases where the owner or owners thereof, or some of them, shall not consent to sell the same for such purpose, or the trustee, trustees, or board of education of the district cannot agree with such owner, or owners, or some of them, upon the price or value thereof, as real property for public use is taken under and pursuant to the laws of the State. The trustee, or trustees, or board of education of any such school district is, or are hereby authorized and empowered to institute, carry on, and complete the proceedings necessary for acquiring said land, and the title thereto, for and on behalf of said district. The method of procedure to acquire such land shall be that prescribed for the condemnation of real property for public use in title one of chapter twenty-three of the Code of Civil Procedure, and any amendments thereof, entitled “Proceedings for the Condemnation of Real Property,” and known as the “Condemnation Law.” § 219 of the Consolidated School Law, Birds. R. S. p. 555.

Lands may also be acquired for cemetery purposes under certain circumstances under the Condemnation Law under the provisions of the act relative to cemetery and cemetery associations. Laws 1870, ch. 760, § 1, as amended Laws 1873, ch. 452; Laws 1875, ch. 206; Laws 1892, ch. 518.

The General Municipal Law makes provision for condemnation of real property as follows:

Section 22. Condemnation of Real Property.—A municipal corporation authorized by law to take and hold real property for the uses and purposes of the corporation, may, if it is unable to agree with the owners for the purchase thereof, acquire title to such property by condemnation.

Section 22 of the General Municipal Laws, p. 244 of the Village Laws of N. Y.—The Village Law provides not only for contracts for water supply and acquisition for existing systems, but for the establishment of water works, and proceedings to obtain property by condemnation.

Section 223. Establishment of Water Works.—If a proposition to establish a system of water works be adopted, the board of water commissioners shall proceed to construct such system accordingly.

Art. 2. Title, Definitions, and Scope of Act.

It shall prepare a map and plans showing the sources of water supply and a description of the lands, streams, water, or water rights to be acquired therefor, and the mode of constructing the proposed water works and the location thereof, including reservoirs, mains, distributing pipes, and hydrants. The water commissioners, their agents, servants, and employes, may enter upon any lands for the purpose of preparing such map and plans. The map and plans shall be filed with the village clerk, and a certified copy of such map shall also be filed in the county clerk's office of each county in which any of the lands are situated. The board of water commissioners may acquire in the name of the village, by purchase, if it can agree with the owners, or otherwise by condemnation, any land, streams, water, or water rights necessary for such system. The board may amend the map and plans at any time, and such amended map shall be filed in the office of the village clerk, and of the county clerk, in like manner as the original. The board may construct such water system by contract or otherwise, and may appoint and at pleasure remove a superintendent to take charge of the system, and fix his compensation.

Special and specific provisions are made by the Laws of 1889, ch. 422, for the acquiring of the right by corporations to lay pipe-lines for natural gas.

ARTICLE II.

TITLE, DEFINITIONS, AND SCOPE OF ACT. §§ 3357, 3358, 3359.

§ 3357. Title.

This title shall be known as the Condemnation Law.

§ 3358. [Am'd, 1896.] Definitions.

The term "person," when used herein, includes a natural person and also a corporation, joint-stock association, the State and a political division thereof, and any commission, board, board of managers, or trustees in charge or having control of any of the charitable or other institutions of the State; the term "real property," any right, interest, or easement therein or appurtenances thereto; and the term "owner," all persons having any estate, interest, or easement in the property to be taken, or any lien, charge, or incumbrance thereon. The person instituting the proceedings shall be termed the plaintiff; and the person against whom the proceeding is brought the defendant.

L. 1896, ch. 589.

§ 3359. Proceedings to be taken as prescribed in this title.

Whenever any person is authorized to acquire title to real property, for a public use

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by condemnation, the proceeding for that purpose shall be taken in the manner prescribed in this title.

A complete system of practice in condemnation proceedings is provided by chap. 23 of the Code, which is a revision of the Condemnation Law, and an order dismissing the proceedings is treated as a final judgment dismissing the complaint. *Village of Canandaigua v. Benedict*, 13 App. Div. 600, citing *Dansville Rd. Co. v. Hammond*, 77 Hun, 41; *Matter of Trustees*, 137 N. Y. 97. But the clear intention of the Condemnation Law, chap. 23 of the Code, is to adopt the procedure under that law as far as practicable to the ordinary procedure in actions and proceedings. The only material change is that the appellant must now go in the first instance to the Special Term, and no longer has an option to proceed either at the Special Term or at the General Term. *Matter of Manhattan Railway Co. v. O'Sullivan*, 6 App. Div. 571, affirmed, 150 N. Y. 569.

A railroad may acquire land outside of its proper route for the purpose of making connections with an intersecting road. *Matter of Brooklyn Elevated Rd. Co.*, 32 St. Rep. 1065, 11 Supp. 161. So, also, a railroad company may institute proceedings to condemn land after a road has been constructed. *Matter of Metropolitan Rd. Co.*, 12 Supp. 502. A foreign railroad corporation may acquire lands by the exercise of the power of eminent domain. *Matter of Appraisal of Lands of Marks*, 25 St. Rep. 502, 6 Supp. 105; *N. Y., N. H. & Hartford Rd. Co. v. Welsh*, 52 St. Rep. 532, 23 Supp. 195. Proof that additional tracks are needed to enable a company to unload passengers so as to avoid delay, is sufficient to show necessity for lands sought to be condemned. *N. Y., N. H. & Hartford Rd. Co. v. Welsh*, 52 St. Rep. 532, 23 Supp. 195. Street railroad companies have power to acquire property belonging to private individuals by condemnation. *Matter of Application of Roch. Elec. Ry. Co.*, 57 Hun, 56, affirmed, 123 N. Y. 351. An electric railway company may maintain such proceedings to condemn an easement, although the road has been constructed. *Matter of Mct. Elevated Ry. Co. v. Dominick*, 55 Hun, 198, 27 St. Rep. 576, 8 Supp. 15. But a private corporation not organized, carrying on a railroad for the public use, cannot maintain condemnation proceedings. *Matter of Split Rock Cable Rd. Co.*, 128 N. Y. 408, 28 N. E. Rep. 506, 40 St. Rep. 335, affirming 58 Hun, 351, 53 St. Rep.

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169, 12 Supp. 116. A foreign railroad corporation may be authorized to acquire additional land for its purposes by condemnation, and such authority was conferred by the General Railroad Act of 1892. *N. Y., N. H. & Hart. v. Walsh*, 143 N. Y. 411, 62 St. Rep. 429.

A rural cemetery association in which any person may purchase a lot on equal terms with others, may condemn lands for its use, but the petition must state the facts that no persons are thus excluded. *Stannard Corners Rural Cemetery Ass. v. Brandes*, 14 Misc. 270, 35 Supp. 1015, 70 St. Rep. 674. But proceedings for condemnation cannot be maintained unless the person instituting it has authority under some statute to acquire title to land for public use. *Matter of Thompson*, 86 Hun, 405, 33 Supp. 467, 67 St. Rep. 193. Lands which have been once taken for and devoted to the public use, pursuant to law, cannot be again taken under the right of eminent domain and devoted to another public use without special authority of the legislature. *Matter of the City of Buffalo*, 72 Hun, 422.

This rule only applies where it is sought to deprive the person or corporation to which the first public use is granted of a substantial use of the property. An easement may be acquired by condemnation in such property, when it may be enjoyed without detriment to the public and without interfering with the use to which the lands are devoted. *Matter of Foltz St.*, 18 App. 568, citing *Matter of Rochester Water Co.*, 66 N. Y. 413; see *Pro. ex rel. Yonkers v. N. Y. C. & H. R. R. Co.*, 69 Hun, 166.

It seems that city streets may be used for any public use consistent with their preservation as such, although the use may be new and impose an additional burden, and subject lot-owners to injury, and that the use of the said streets for the ordinary horse or steam railroad, unless it practically closes the street, is lawful, and abutting owners whose lots are bounded by the sides of the street have no legal redress in the absence of negligence in the construction and operation of the railroad, although it may seriously interfere with the value of their property. *Kane v. N. Y. Elev. R. R. Co.*, 125 N. Y. 164. Land acquired by a railroad by purchase and used for terminal facilities may be taken by the State for a street without special legislation. *Matter of Alexander Av.*, 44 St. Rep. 546, 17 Supp. 933. But where the legislature has conferred upon a corporation or municipality the general power to acquire lands by the right of

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eminent domain, such power does not apply to lands already dedicated by authority of law to the public use, unless such right is expressly conferred by the statute in direct terms or by necessary implication. *Matter of the City of Utica*, 73 Hun, 256, 58 St. Rep. 80, 26 Supp. 564.

The condemnation of lands along the river front of New York City for use of piers, wharves, etc., is not unlawful as being for a private use, and the fact that the property to be taken is already in use by a railroad company does not prevent condemnation proceedings. *Matter of Mayor*, 135 N. Y. 253, 47 St. Rep. 816, affirming 18 Supp. 536, 45 St. Rep. 937.

A railroad company cannot condemn lands to open a highway to a hotel a third of a mile distant for entertaining its patrons; and the construction of a place for the storage of boats of passengers visiting a watering place on the line of petitioner's railroad is not for railroad purposes, and the land therefore is not subject to condemnation. *Matter of Rochester and Glen Haven Rd. Co.*, 12 Supp. 566. Nor can land be taken for station purposes by a railroad company where no necessity therefor appears by the petition. *Matter of Union Elec. Rd. Co. v. Jewett*, 30 St. Rep. 162, 8 Supp. 813.

Although it was held that the fact that a railroad company owned property at a station which it had leased to a company for purposes which largely increased railroad travel, is no objection to an application to condemn other lands for that purpose. *In re N. Y. C. & H. R. R. Co.*, 28 St. Rep. 64, 8 Supp. 290, 5 Silv. 353.

The proceedings to acquire title to lands for railroad purposes were held to be special proceedings. *New York Central R. R. Co. v. Marvin*, 11 N. Y. 276; *Matter of Lackawanna, etc., R. R. Co.*, 26 Hun, 592; *Matter of N. Y., W. S. & B. R. R. Co.*, 33 id. 231; *Rensselaer & Saratoga R. R. Co. v. Davis*, 55 N. Y. 145; *A. & S. R. R. Co. v. Dayton*, 10 Abb. (N. S.) 182; *Matter of Cortland, etc., Horse R. R. Co.*, 98 N. Y. 336; *Matter New York & Harlem R. R. Co.*, id. 12, and were regulated by the provisions of chapter 140, Laws of 1850, known as the General Railroad Act, and the amendments thereto, previous to the enactment of the Condemnation Law. The basis of the proceedings is the right of eminent domain, which existed prior to the constitution (*Heyward v. Mayor of New York*, 7 N. Y. 314), but which is recognized by it. *Wallace v. Karlenowefski*, 19 Barb. 118. The limitations

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upon the right of eminent domain are that the use must be a public one, and that compensation must be made to the owner. *Beckman v. S. & S. R. R. Co.*, 3 Paige, 45; *Varick v. Smith*, 5 id. 137; *Embury v. Conner*, 3 N. Y. 511; *Buffalo & N. Y. R. R. Co. v. Brainard*, 9 id. 100; *People v. Smith*, 21 id. 595. Railroads are regarded as a public use of property, although occupied and used by private corporations. *Matter of Townsend*, 39 N. Y. 171; *N. Y. & H. R. Co. v. Kip*, 46 id. 546.

The General Railroad Act gave to corporations created under it authority to acquire lands by the exercise of the right of eminent domain, both from individuals and from the State, for its prospective as well as present uses, provided the necessity for such use in the immediate future is established beyond reasonable doubt. It seems, that as the exercise of this power is in derogation of individual right, it should be allowed only when the necessity clearly appears and the proposed use is clearly embraced within the legitimate objects of the power. *In re Staten Island Rapid Transit Co.* 103 N. Y. 251. A railroad company, under the power delegated to it by the General Railroad Act to acquire lands for the purposes of its incorporation, has, to a large extent, the right to determine the measure of its wants, and to fix upon the location of land to be appropriated subject to the qualification that the purposes for which the land is taken are strictly within its charter, and the lands of private corporations are subject to the exercise of the right of eminent domain the same as individuals. *Matter of Petition of N. Y. C. & H. R. R. R. Co. v. The Metropolitan Gas-Light Co.*, 63 N. Y. 326.

The act authorizing the condemnation of private property for public purposes must, however, be clear and explicit. If there are doubts as to the extent of the power after all reasonable intendments in its favor, the doubts should be resolved by a decision adverse to its exercise. *New York R. R. Co. v. Kip*, 46 N. Y. 546. And before the fee can be taken in the exercise of power of eminent domain, it must appear that such was the intention of the legislature, disclosed by the act. *Washington Cemetery v. Prospect Park*, 68 N. Y. 591. Nor, on the other hand, can the public be compelled to take a fee where an easement will suffice. *Jerome v. Ross*, 7 Johns. Ch. 515. The general principle is that all property is subject to the right of eminent domain, irrespective of the use to which it has been already applied or the different es-

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tates or interests held in it. *Pierce on Railroads*, 151, and cases cited. The language of the act, however, does not authorize a railroad corporation to subvert an appropriation of property to other public uses which are inconsistent with the use thereof for a railroad. *In Matter of City of Buffalo*, 68 N. Y. 171. It is held in *Matter of Rochester Water Commissioners*, 66 id. 413, that neither a private nor municipal corporation can, under a general power to take lands for a public use, take from another corporation having the like power, lands or property held by it for a public purpose pursuant to its charter. The same principle is asserted in *Matter of N. Y. & B. R. R. Co.*, 20 Hun, 201; *In re Boston & Albany R. R. Co.*, 53 N. Y. 574; *Rensselaer & Saratoga R. R. Co. v. Davis*, 43 id. 137; *Brooklyn Park Commissioners v. Armstrong*, 45 id. 234; *N. Y. City, etc., R. R. Co. v. Central Union Telegraph Co.*, 21 Hun, 261; *Prospect Park & C. I. R. R. Co. v. Williamson*, 91 N. Y. 552; see *Mills on Eminent Domain*, § 45. The land, when acquired, may be used for the legitimate business of the company. *Pierce on Railroads*, 159, and cases cited. In exercising the power of eminent domain the statute must be strictly followed. *Adams v. S. & W. R. R. Co.*, 10 N. Y. 328; *In re City of Buffalo*, 68 id. 171. And the title of the company vests only on payment of the compensation awarded. *Clarkson v. H. R. R. Co.*, 12 N. Y. 304; *Ballou v. Ballou*, 78 id. 325. And on complying with the conditions precedent, as provided by the award, the Supreme Court has power to put the petition in possession of the property condemned. *Matter of Application of H. R. R. Co.*, 60 N. Y. 116.

Statutes delegating the right of eminent domain to railroad and other corporations for public use, being in derogation of common-law rights, are not to be extended by implication, and must be strictly complied with. Yet they are not to be construed so literally as to defeat the evident purposes of the legislature. The powers granted will extend no further than is expressly stated in the act, or than is necessary to accomplish its general scope and purpose. If there remain a doubt as to the extent of the power, after all reasonable intendments in its favor, the doubt will be solved adversely to the claim of power. Passenger depots, convenient and proper places for the storing and keeping of cars and locomotives; proper, secure, and convenient places for the receipt and delivery of freight, and for the safe and secure keeping of

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property between the time of its receipt and despatch, or after its arrival and discharge, and before delivery, are the acknowledged necessities for the running and operating of a railroad, and the right to take lands for those purposes is included in the grant of power given by the General Railroad Act, which authorizes a railroad corporation to acquire real estate "for the purposes of its incorporation or for the purpose of running or operating" its road. It is no objection to proceedings under the act that there are other lands in the same vicinity equally well adapted for the purposes which possibly might be acquired by purchase. The location of the buildings and structures of the company is within the discretion of its managers, and courts will not supervise it ordinarily. An usufructuary right, either temporary as to its continuance or limited as to its character, does not give to the company the property which it has a right under the statute to acquire. And whenever the proper running and operating of its road and the interests of the public require permanent structures, it is no objection to a proceeding to acquire the land in fee that the company is a lessee of the premises for a term of years. *Matter of the New York & Harlem R. R. Co. v. Kip*, 46 N. Y. 546. The only limit to the power granted to railroad corporations to take lands for railroad purposes is the reasonable necessity of the corporation in the discharge of its duty to the public. This includes the acquisition of lands for depots and buildings convenient and proper for the storage and keeping of cars and locomotives when not in use, and for the receipt, storage, safekeeping, and delivery of freight and property, as well as such facilities as are usually required in operating its road and the successful prosecution of its business. When the necessity exists and a reasonable discretion is exercised, the courts will not interfere. In determining the necessity, the prospective needs of the corporation within a reasonable time may be taken into consideration. When a case is brought within the legitimate exercise of this power, the consideration that such exercise will be attended with extreme inconvenience and hardship to individuals is not entitled to any weight; where a clear right to the exercise of the power is shown, it is the duty of the courts to authorize it. The rule, however, that corporations deriving power from the legislature to take property under the right of eminent domain cannot exercise such power in reference to property already dedicated to public

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use, does not prohibit the acquisition of a right to use streets and avenues and piers at the end thereof, included within land sought to be condemned for railroad purposes. The rights in the waters of the port of New York reserved to the public by the acts of the legislature, granting lands under water to the city of New York, are not invaded by the appropriation of the land for such railroad purposes. *Matter of New York Central & Hudson River R. R.*, 77 N. Y. 248. Railroad companies are not to be allowed to appropriate lands under the statute not wanted for present use, but only desired in view of prospective and conjectural increase in business; nor lands for building tenements for their servants, or wharves unless they are shown to be necessary for corporate purposes. Clear authority of law must be shown for taking private property. The court is to determine the necessity and extent of appropriation of land by a railroad company under the General Railroad Act. *Rensselaer & Saratoga R. R. Co. v. Davis*, 43 N. Y. 137. Where the company has immediate need of property for a passenger depot, the opinion of the officers as to its size and location are entitled to great weight unless it appear that, under pretence of the necessities of the company, it is seeking to injure others. *N. Y., West Shore & B. R. R. Co. v. Townsend*, 17 Week. Dig. 469. Where lands have been lawfully appropriated by a railroad company for depot purposes under the right of eminent domain, express legislation is necessary to justify their appropriation by proceedings *in invitum* to a different public purpose. Where lands were condemned for depot purposes, it was held that the erection thereon of decorations and conveniences for passengers, such as restaurants and music stands, was not such an abandonment of the uses for which the lands were acquired as to produce a forfeiture. *Prospect Park & C. I. R. R. Co. v. Williamson*, 91 N. Y. 552, reversing 24 Hun, 216; *Matter of Boston & Albany R. R. Co.*, 53 N. Y. 574. The title to lands under water may be acquired by a railroad company without notice to the owner of the adjoining upland. *Matter of N. Y., W. S. & B. R. R. Co.*, 29 Hun, 269, citing *Gould v. H. R. R. Co.*, 6 N. Y. 522.

It is said that a railroad corporation may acquire title to lands under water where parties having a grant have failed to fulfil conditions imposed. *Matter of N. Y., West Shore & Buffalo R. R. Co.*, 27 Hun, 57, reversed, 89 N. Y. 453, on authority of 77 *id.*

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248, which is there approved. Where land is required for the legitimate purposes of a railroad in respect to its public use, it is subject to condemnation for such purposes under the General Railroad Act, although the route of the proposed road may not pass directly over it. *New York, Lackawanna, etc., R. R. Co. v. Schenck*, 33 Hun, 148, affirmed without opinion, 98 N. Y. 664. But under the previous statute a company cannot acquire title to real estate without the owner's consent, simply for the purpose of removing gravel therefrom, to be used in constructing a distant part of the road. *Matter of N. Y. & Canada R. R. Co. v. Gunnison*, 1 Hun, 496. A railroad company is not disqualified to take proceedings to condemn land for its benefit by the fact that it has been leased to another company, nor is the rule altered by the fact that the lessee is a foreign corporation. *N. Y., Lackawanna, etc., R. R. Co. v. Union Steamboat Co.*, 99 N. Y. 12, affirming 35 Hun, 220.

Before a proposed railroad can be built, its builders must obtain the right of way; they cannot take private property for that purpose without first making compensation therefor; and if they do, they become trespassers. *Uline v. N. Y. C. R. R. Co.*, 101 N. Y. 98. The legal existence of a corporation authorized to construct a railroad is the foundation of the right to take property for its use under the right of eminent domain. *Matter of Kings Co. Elevated R. R.*, 1 St. Rep. 512. The provision of the General Railroad Act to divest owners of title to property without their consent must be strictly construed. *Adams v. Saratoga & Washington R. R. Co.*, 10 N. Y. 328, citing *Sharp v. Spicer*, 4 Hill, 76; *Stryker v. Kelly*, 2 Denio, 323.

ARTICLE III.

PETITION, NOTICE, AND SERVICE THEREOF. §§ 3360, 3361, 3362, 3366.

§ 3360. Petition; what to contain.

The proceeding shall be instituted by the presentation of a petition by the plaintiff to the Supreme Court, setting forth the following facts:

1. [Am'd, 1896.] His name, place of residence, and the business in which engaged; if a corporation or joint-stock association, whether foreign or domestic, its principal place of business within the State, the names and places of residence of its principal officers, and of its directors, trustees, or board of managers, as the case may be, and the object or purpose of its incorporation or association; if a political division of the State, the names and places of residence of its principal officers; and if the State, or any commission or board of managers, or trustees in charge or having control of

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any of the charitable or other institutions of the State, the name, place of residence of the officer acting in its or their behalf in the proceedings.

2. A specific description of the property to be condemned, and its location, by metes and bounds, with reasonable certainty.

3. The public use for which the property is required and a concise statement of the facts showing the necessity of its acquisition for such use.

4. The names and places of residence of the owners of the property; if an infant, the name and place of residence of his general guardian, if he has one; if not, the name and place of residence of the person with whom he resides; if a lunatic, idiot, or habitual drunkard, the name and place of residence of his committee or trustee, if he has one; if not, the name and place of residence of the person with whom he resides. If a non-resident, having an agent or attorney residing in the State authorized to contract for the sale of the property, the name and place of residence of such agent or attorney; if the name or place of residence of any owner cannot after diligent inquiry be ascertained, it may be so stated, with a specific statement of the extent of the inquiry which has been made.

5. That the plaintiff has been unable to agree with the owner of the property for its purchase, and the reason of such inability.

6. The value of the property to be condemned.

7. A statement that it is the intention of the plaintiff, in good faith, to complete the work or improvement, for which the property is to be condemned; and that all the preliminary steps required by law have been taken to entitle him to institute the proceeding.

8. A demand for relief, that it may be adjudged that the public use requires the condemnation of the real property described, and that the plaintiff is entitled to take and hold such property for the public use specified, upon making compensation therefor, and that commissioners of appraisal be appointed to ascertain the compensation to be made to the owners for the property so taken.

L. 1896, ch. 589. In effect May 12, 1896.

§ 3361. Notice to be annexed to petition; service of.

There must be annexed to the petition a notice of the time and place at which it will be presented to a Special Term of the Supreme Court, held in the judicial district where the property or some portion of it is situated, and a copy of the petition and notice must be served upon all the owners of the property at least eight days prior to its presentation.

§ 3362. Service of petition and notice.

Service of the petition and notice must be made in the same manner as the service of a summons in an action in the Supreme Court is required to be made, and all the provisions of articles one and two of title one of chapter five of this act, which relate to the service of a summons, either personally or in any other way, and the mode of proving service, shall apply to the service of the petition and notice. If the defendant has an agent or attorney residing in this State, authorized to contract for the sale of the real property described in the petition, service upon such agent or attorney will be sufficient service upon such defendant. In case the defendant is an infant of the age of fourteen years or upwards, a copy of the petition and notice shall also be served upon his general guardian, if he has one; if not, upon the person with whom he resides.

§ 3366. Verification of petition or answer.

A petition or answer must be verified, and the provisions of this act relating to the

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form and contents of the verification of pleadings in courts of record, and the persons by whom it may be made, shall apply to the verification.

A petition in condemnation proceedings may state facts on information and belief. *Matter of Met. Elev. Rd. Co.*, 7 Supp. 707, 26 St. Rep. 968. But it seems that this rule does not apply to the statement of inability to acquire title, which must be stated as a matter of fact within the knowledge of the petitioner. *Matter of Met. Elev. Rd. Co. v. Dominick*, 55 Hun, 198, 8 Supp. 151, 27 St. Rep. 576, citing *In re Marsh*, 71 N. Y. 315. Extreme accuracy is required in the description of the property sought to be acquired, and there must be no uncertainty in such description, or in the degree or interest sought to be acquired. *Met. Elev. Rd. Co. v. Dominick*, 55 Hun, 198.

It is said in the *Matter of the Water Com. of Amsterdam*, 96 N. Y. 360, "It has been uniformly held that in proceedings of this character, extreme accuracy is essential for the protection of the rights of all parties. There must be no uncertainty in the description of the property to be taken, nor in the degree of interest to be acquired." Citing *Matter of N. Y. C. & H. R. R. Co.*, 70 N. Y. 191. These authorities were cited and followed in *City of Syracuse v. Stacy*, 86 Hun, 441; see also cited to the same point, *Peo. ex rel. Eckerson v. Trustees, etc.*, 137 N. Y. 88; *Hayden v. State*, 132 N. Y. 533.

Section 3360 contains what is necessary to be alleged in a petition for condemning land. If the petition of a municipal corporation sets forth the lands it is necessary to acquire for the purposes of extending a city street, it is not necessary to describe any lands which the owners consent to convey to the city. If the petition sets forth that such owners have so consented to convey, the fact that certain property owners, who had previously agreed to convey to the city, thereafter receded from their agreement, after condemnation proceedings brought against the persons who had not so agreed to convey, does not affect the regularity of the proceedings instituted, nor does the fact that such proceedings having been instituted against one person, present any legal objections to a subsequent second proceeding against the lands of owners whose property it is necessary to have to complete the street opening. *City of Johnstown v. Wade*, 30 App. Div. 13.

Jurisdiction is obtained in condemnation proceedings by the service of the petition and requisite notice. Although the legis-

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lature cannot dispense with the giving of notice in such proceedings, it may by statute prescribe the kind of notice, and the mode of giving it. *H. E. Rd. Co. v. N. Y., L. E. & W. R. R. Co.*, 83 Hun, 407, 64 St. Rep. 416, 31 Supp. 745. The court only has jurisdiction when the applicant cannot acquire title by purchase, or with the assent of the owner. The law is zealous of the rights of property, and will not permit them to be invaded under the right or color of eminent domain except upon necessity, and when title cannot be obtained by purchase and with the consent of the owner. The reasons of the inability must be stated that the court may determine their sufficiency, and also that the owner of the land may negative or disprove them, as the reasons why agreement cannot be had may be various, and a petition which fails to state the reasons for disagreement is defective. *Matter of Marsh*, 71 N. Y. 316, citing *N. Y. & B. R. R. Co. v. Goodwin*, 12 Abb. (N. S.) 21; *Gilbert v. Columbia Turnpike Co.*, 3 Johns. Cas. 107; *Matter of Prospect Park v. Coney Island R. R. Co.*, 67 N. Y. 371. The petition must show such a description of the land sought to be condemned as will show its location and the boundaries thereof. A defective description cannot be remedied by reference to a description in a deed. In proceedings of this character extreme accuracy is essential for the protection of the rights of all the parties, and a failure to comply with the statute must lead to difficulty and embarrassment. *Matter of N. Y. C. & H. R. R. Co.*, 70 N. Y. 192; see *Matter of N. Y. C. R. R. Co.*, 20 Barb. 419. A petition under a special statute, Laws of 1875, chap. 686, with same clause as to failure to agree, was held sufficient where it stated that the petitioner has not been able to acquire title to said land, and that the reason of such inability is that the owner refuses to sell the same for any reasonable compensation, and that your petitioner has not been able to agree with the owner or owners of said real estate, or of any interest therein, for the sale of the same to your petitioner. It seems that a defect in the petition may be cured by proof presented upon hearing. *Matter of Suburban Rapid Transit Co.*, 38 Hun, 553. In *Matter of N. Y. Cable R. R. Co.*, 36 Hun, 356, a statement there made as to failure to agree was held insufficient under the statute under which the application was made, following *Matter of Broadway Underground Ry. Co.*, 23 Hun, 693; see *Matter of One Hundred and Thirty-eighth Street*, 60 How. 290; *Matter of Suburban Transit Co.*, 16 Abb.

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N. C. 152. It is held in the latter case that the defect is amendable, and that where such a general allegation is put in issue by the opposing affidavits, the court may receive from the petitioner affidavits of the facts in support of the allegations as proofs under the issue. It is held, in *Matter of Metropolitan Ry. Co.*, 14 Week. Dig. 520, that proceedings to acquire lands for the use of a railroad company may be maintained if the proof establishes the truth of the allegations of the petition that the owner refused to sell for any reasonable consideration to a reasonable degree of certainty. It is not necessary that in the negotiations for purchase with the owner the specific boundaries should have been given, as in the petition; it is sufficient if the owner understands what property the company desires to obtain. But in *Matter of N. Y. Central, etc., R. R. Co.*, 15 Week. Dig. 201, it is held that a description of the lands sought to be acquired in the petition which designates the east and west lines thereof as being those described in the deed to the present owners, and the south line to be at a specific distance from the south line of petitioner's land, was not sufficient. Stating that the price asked for the land is excessive is a sufficient statement of the reason of inability to acquire title. The petition may ask both for lands for the route and lands for building, and without giving separate descriptions. A statement that the company is a corporation, duly organized under and in pursuance of the laws of the State of New York and New Jersey, for the purpose of constructing its line of the road, and then stating how and under what law it is organized, is sufficient. The petition must state that the land is required for the purpose of constructing or operating the proposed road. *Matter of N. Y., West Shore & B. R. R. Co.*, 64 How. 216. The same case holds that an objection to the sufficiency of the petition may be raised and disposed of before trying the issues.

One who has, or claims to have, an interest in the lands sought to be acquired, if not named in the petition, has a right to be made a party of the proceedings on timely application to the court, supported by affidavits, which, if true, show him to be a party in interest; the allegations in the affidavit must be tried by legal evidence and not by counter-affidavit, and the court has no right to impose a condition upon an applicant who makes out a *prima facie* case. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 26 Hun, 194. After an order has been made and appealed

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from the petition cannot be amended ; proceedings are under a statute and must be strictly followed. *Matter of N. Y., West Shore & B. R. R. Co.*, 89 N. Y. 453, reversing 27 Hun, 57. Under a petition to ascertain what compensation should be paid, all parties having an interest in a street through which the railroad is to pass have a right to be heard. An application to amend the petition should be made at the Special not at the General Term. *Matter of Metropolitan Transit Co.*, 7 St. Rep. 477. An objection is not well taken that a petition fails to show \$10,000 per mile of the proposed road has been subscribed and ten per cent. paid in. Section 6, chapter 560, Laws 1871, only shows \$6,000 per mile need be subscribed and ten per cent. paid in where the road is a narrow-gauge road. *Matter of Sheepshad Bay, etc., R. R. Co.*, 5 Week. Dig. 488. The provisions of § 26 do not require proceedings to be taken thereunder for the acquisition of lands, but petition may be made for appraisal at the option of the company. *Matter of N. Y. Bridge Co.*, 67 Barb. 295. Where a railroad company requires additional land, it is not necessary, in the new petition, to embody the allegations of the former one, or that the map required by the General Act should be filed. *N. Y. Central R. R. Co. v. Sweeney*, 4 Hun, 381 ; *N. Y. Central R. R. Co. v. Pierce*, 33 id. 274. A compulsory reference cannot be ordered to take proof upon a petition to acquire lands for railroad purposes. *Matter of Sheepshad Bay, etc., R. R. Co.*, 5 Week. Dig. 488. Within the meaning of the General Act, § 14, and the requirements of the Code of Civil Procedure, § 525, a general agent for the purchase of lands for obtaining right of way for a railroad corporation is an officer having authority to verify petitions in proceedings to acquire title to lands. *Lackawanna, etc., R. R. Co. v. Schen*, 33 Hun, 148. Inability to procure the assent of the landholders is the only prerequisite under the statute to the appointment of commissioners. An application for the appointment of commissioners should not be denied because other companies having coincident routes have refused their consent to the construction and operation of the road of petitioner as required by § 14. *Matter of Thirty-fourth Street R. R. Co.*, 102 N. Y. 343. In proceedings upon petition by a railroad company to take a designated piece of upland along the river bank, the objection that the petitioner intends to build an embankment across a bay cutting

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off a dock from the river is not presented. The remedy is at law or in equity. *Matter of N. Y., W. S. & B. R. R. Co.*, 101 N. Y. 685. It is held, in *Matter of Boston, H. T. & W. R. R. Co.*, 10 Abb. N. C. 104, and *New York & Albany R. R. Co. v. N. Y., W. S. & B. R. R. Co.*, 11 id 386, that a map which indicates only a single line is insufficient. A railroad company may petition for the appraisal of the surface only of the land required for its road. *Ex parte Hartford & Conn. W. R. R. Co.*, 65 How. 133.

The notice should be given to afford an opportunity to raise questions as to the regularity of the proceedings, as that the petition was not properly verified, or that it does not appear there was a failure to agree with the owner, since it is too late to raise these objections on confirmation of the report. *N. Y. & Erie Ry. Co. v. Corey*, 5 How. 177. If the petition does not show the facts required by statute to be stated, the objection may be disposed of before trial. *Matter of N. Y., W. S. & B. R. R. Co.*, 64 How. 217. Parties having liens upon the lands should have notice of the proceedings. *Watson v. N. Y. C. R. R. Co.*, 6 Abb. (N. S.) 91. See *Watson v. N. Y. C. R. R. Co.*, 47 N. Y. 157, *supra*, referring to another statute.

An allegation that only reasonable notice was given was held bad in an action for trespass. *Cruger v. H. R. R. R. Co.*, 12 N. Y. 190. And it is held by same authority that where a notice of appraisal is defective, nothing short of an appearance by the party whose lands are sought to be taken and actual litigation on the merits ought to be regarded as an implied waiver of the defect. The provisions of Laws 1870, chapter 198, for publication of notice of appraisal, apply only where the owners of the adjoining lands on the line of street have the fee, and this right is sought to be extinguished. *Matter of N. Y. Central R. R. Co.*, 77 N. Y. 248. In any proceeding to condemn the private property of a citizen for a public use, all notices and hearings that may tend to give the party to be affected any semblance of benefit must be carefully observed. *People v. Kniskern*, 54 N. Y. 52; see *Mills on Eminent Domain*, § 95. In *Stewart v. Palmer*, 74 N. Y. 183, it is held in case of an assessment that it is not enough that the owner by chance have a notice, or that he may as a matter of favor have a hearing, it is a matter of substance. *Cruger v. H. R. R. Co.*, 12 N. Y. 190. A voluntary appearance and litigation on the merits waives notice. *Dyckman v. The*

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Mayor, 5 N. Y. 434. Notice of time and place of filing map and profile is necessary. *Wallkill Valley R. R. Co. v. Norton*, 12 Abb. (N. S.) 317; *Matter of N. Y. & B. R. R. Co.*, 62 Barb. 85. But this is only required as to actual occupants and not to owners who are not occupants. *Lackawanna, etc., Co. v. Schen*, 33 Hun, 148. Where the person on whom service was to be made, although a resident of the State, was at the time absent in Europe, *held*, that a service on a party of suitable age left in charge of the dwelling-house of such person during his absence, was in conformity with the statute. *Matter of N. Y. & Oswego R. R. Co.*, 40 How. 335.

Where lands were taken under a special statute, it was held that that statute was intended to secure the attendance of some fit person before the tribunal making the appointment, as guardian or attorney to attend personally to the interests of the infant, and that without such appearance the proceedings in that case were entirely unauthorized and void, and that until such appearance jurisdiction was not acquired. *Hotchkiss v. Auburn, etc., R. R. Co.*, 36 Barb. 600. Where there is what is termed a special estate in the lands, as for life, for years, inheritance, at will, or sufferance, the petition must state those facts. Chap. 444, § 2, Laws 1857. Under the provisions of § 25 of the General Railroad Act, no notice is required to be given to owners of adjoining upland where application is made to the State authorities for lands under water, as such owner has no interest therein. *Matter of N. Y., W. S. & B. R. R. Co.*, 29 Hun, 269, citing *Gould v. H. R. R. Co.*, 6 N. Y. 552.

The remainderman as well as the life tenant are necessary parties. *In re Met. Elec. Ry. Co.*, 12 Supp. 506. Where, in a proceeding, the land of the owner is incorrectly described and part is omitted, this does not go to the regularity, but to the effect of the proceeding, and the petitioner does not acquire any more of the land than was expressed in the papers instituting proceedings. *Matter of Newland Ave.*, 15 Supp. 63, 38 St. Rep. 796.

In a proceeding to acquire riparian rights of one whose remaining property will be cut off from said rights, it is only necessary, however, to describe in the petition the property sought to be acquired. *New Rochelle Water Works v. Brush*, 47 St. Rep. 388, 19 Supp. 954.

The petition by an elevated railroad company to construct a

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railroad through a street need not show whether it is an easement or a fee of the abutting owners of the street that is sought to be condemned. *Matter of Met. Elev. Rd. Co.*, 12 Supp. 506.

Where a petition to have commissioners appointed complies literally with subdivision 7 of § 360, but does not state specific facts, it nevertheless confers jurisdiction. *Rochester Rd. Co. v. Robinson*, 133 N. Y. 242, 44 St. Rep. 872, reversing 38 St. Rep. 1022, 16 Supp. 381.

The failure to state in a petition by a water company that the water was to be supplied for the extinguishment of fires and for sanitary and other public purposes is cured of the defect by the proof adduced on the trial and the finding of the court of a contract in the express terms of the statute. *New Rochelle Water Works v. Brush*, 19 Supp. 954, 47 St. Rep. 388. It is held, in *Matter of City of Buffalo*, 15 Supp. 123, 39 St. Rep. 417, that a statement in a proceeding to acquire the fee in a street, and that the lands were to be used for public purposes, is conclusive as to the purposes for which they are to be used, and that the owners cannot show that the common council intended to acquire title for the benefit of a railroad company.

A petition which alleges that premises occupied by a railroad company are inadequate for the carrying on of its business, and the addition of the lands sought to be condemned will be adequate and sufficient, contains facts showing the necessity of the acquisition. *Broadway & 7th Av. Rd. Co.*, 73 Hun, 7, 25 Supp. 1080, 57 St. Rep. 108. An allegation in a petition that the easements sought to be condemned are those "which now are or may be the subject of injury from the construction of said railroad, or incidental to its use," is a sufficient description of the easement to be taken. *Matter of Brooklyn Elev. Rd. Co. v. Nagel*, 75 Hun, 590, 59 St. Rep. 161, 27 Supp. 669.

A petition under the Laws of 1857 to take water for the use of a company sufficiently describes the quantity to be taken where it states the size of the pipe, its grade, and the estimated flow. *Matter of Malone Water Works Co.*, 38 St. Rep. 95, 15 Supp. 649. A statement in a petition to acquire title to land, that the owner demands an unreasonable price, is sufficient to show a failure to agree. *Matter of Long Island Rd. Co.*, 50 St. Rep. 257, 21 Supp. 489, 55 Hun, 610. A petition must contain a statement of petitioner's intention to complete the work. *Eric and C. N. Y.*

Rd. Co. v. Walsh, 1 App. Div. 140, 37 Supp. 996, 73 St. Rep. 539.

The petition in condemnation proceedings may be amended by supplying a more sufficient description of the property to be taken. *City of Syracuse v. Stacy*, 86 Hun, 441, 33 Supp. 929, 67 St. Rep. 704. Where a petition was verified by an attorney for a railroad company, and the verification stated that he was its duly authorized attorney and agent appointed by it to verify in its behalf petitions in such proceedings, it was held that the affiant was an officer of the corporation within the meaning of § 2525 of the Code, and that there was a sufficient compliance with § 3366, requiring said petition to be verified in the same form and by the same persons as pleadings in a court of record. *St. Lawrence & Adirondack Rd. Co.*, 133 N. Y. 270.

The notice of application for the appointment of commissioners must state when and where it will be presented. A notice which states that it will be made to the "Special Term of the Supreme Court of N. Y." on a specified day is not sufficient. *Matter of Broadway & 7th Ave. Rd. Co.*, 69 Hun, 275, 53 St. Rep. 38, 22 Supp. 609. Where a petition is duly presented, but no sufficient cause of opposition is shown, it is the duty of the court to appoint commissioners to estimate the compensation; judicial action upon the law and facts being taken upon the coming in of their report. *Matter of Southern Boulevard Rd. Co.*, 146 N. Y. 352, 69 St. Rep. 183.

Petition by Owner for Appointment of Commissioners (Water Rights). (148 N. Y. 1.)

To the Supreme Court of the State of New York :

The petition of George Clark of the town of Perth, in the county of Fulton and State of New York, respectfully shows :

That at the several times hereinafter named your petitioner was, has since continued to be, and now is the owner in fee of the real property hereinafter described.

That heretofore and without the consent of your petitioner, and without agreeing with him for the compensation to be paid to him therefor, the water commissioners of Amsterdam, as your petitioner is informed and believes, duly organized and created under and pursuant to chap. 101 of the Laws of this State, passed in the year 1881, and acting, or claiming to act pursuant to the authority vested in them in and by said statute and the several acts amendatory thereto, entered upon the lands of your petitioner and took and appropriated

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to their own use, and have since continued to use and appropriate to their own use for the purpose of furnishing the water supply to the city of Amsterdam, the following described property, to wit : (insert description of property taken) and have built thereon and occupied and maintained, and still continue to maintain a dam for the use of supplying water as aforesaid.

And that heretofore and without the consent of your petitioner, and without agreeing with him for the compensation therefor, the said "The Water Commissioners of Amsterdam," acting, as your petitioner is informed and believes, or claiming to act, pursuant to the authority in them vested in and by said statutes, entered upon, took and appropriated to their own use, and have since continued to appropriate and use for the purposes of supplying the city of Amsterdam with water, the following described real property of this petitioner in addition to the real property above herein described, to wit : (insert description of property) and have constructed thereon, and kept and maintained, and still continue to maintain, a conduit line for the passage of water for use in supplying the city of Amsterdam with water.

That by reason of the several acts your petitioner suffered great loss and damage and continues to suffer great loss and damage, to wit, in the sum of \$2,500.

That your petitioner is informed and believes no application has been made pursuant to the provisions of said chap. 101 of the Laws of 1881, and the acts of the legislature of the State of New York amendatory thereof and supplemental thereto, or otherwise, for the appointment of commissioners to appraise and ascertain the compensation to be paid your petitioner for the said real estate so taken and appropriated as aforesaid, and that the said "The Water Commissioners of Amsterdam" have failed to make application under said laws as aforesaid for the appointment of commissioners before taking and using the said lands as aforesaid, and that the said water commissioners have been unable to agree with your petitioner as to the damages sustained by him in the premises.

Wherefore, your petitioner prays that three disinterested persons, citizens of the county in which the said lands and property are situated, who shall be freeholders, be appointed as commissioners of assessment to determine the damages sustained by your petitioner by reason of the taking and appropriating of the said lands of your petitioner as aforesaid under and pursuant to the said statute in such cases made and provided, and your petitioner will ever pray, etc.

Dated, March 2, 1892.

(Add verification.)

GEORGE CLARK,
Petitioner.

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Petition by Corporation (Elevated Railroad).

SUPREME COURT—COUNTY OF NEW YORK.

In the Matter of the Application of Metropolitan Elevated Railway Company relative to acquiring title to certain real estate in the City and County of New York.	}	136 N. Y. 500.
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To the Supreme Court of the State of New York :

The petition of the Manhattan Elevated Railway Company respectfully shows :

1. That your petitioner is a corporation duly incorporated, organized, and existing under and by virtue of acts of the legislature of the State of New York, being chapter 885 of the Laws of 1872 ; chapter 837 of the Laws of 1873 ; chapter 275 of the Laws of 1874 ; chapter 606 of the Laws of 1875, and acts amendatory thereof and supplemental thereto ; to all of which acts your petitioner prays leave to refer as constituting part of this petition, in like manner as if the same were herein set forth in full ; the name of your petitioner having been duly changed by an order of this court bearing date the 6th day of June, 1878, and duly published as by its terms required, from "The Gilbert Elevated Railway Company" to the "Metropolitan Elevated Railway Company."

2. That the routes of the elevated railway of your petitioner were designated and established by the said acts of the legislature and the commissioners appointed by said chapter 885 of the Laws of 1872, and by the commissioners appointed in pursuance of said chapter 837 of the Laws of 1873, and that in said routes are the following portions of streets, avenues, all of which are public streets, highways, and thoroughfares in the city of New York, to wit : (insert names of streets, etc., through which railway passes and on which the property is located.)

3. That under and by virtue of the provisions of an act of the legislature of the State of New York, passed the 18th day of June, 1875, being chapter 606 of the Laws of 1875, and entitled "An act further to provide for the construction and operation of a steam railway or railways in the counties of the State," certain commissioners were appointed for the purpose of designating routes for the railway as specified in said act, and that said commissioners in accordance with and pursuant to the said act did determine upon the routes of railway coinciding with the routes designated and established by your petitioner by the aforesaid acts, and by the commissioners appointed by and in pursuance of said chapter 885 of the Laws of 1872 and said chapter 837 of the Laws of 1873, and did decide upon the plans for the construction of the railway to be constructed upon the said routes, which were also duly consented to by the mayor, aldermen, and commonalty of the said city of New York, and did impose certain conditions and requirements in respect to the building of the said railway upon said routes. And your petitioner being a corporation thus duly organized, and not having forfeited its charter or failed to comply with the provisions thereof,

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and being formed for the purposes specified in said chapter 606 of the Laws of 1875, did fulfil all the conditions and requirements imposed by said commissioners, and thereupon became possessed of and had and now has like power to construct, maintain, and operate the railway authorized and provided for as aforesaid as a corporation specially formed under said chapter 606 of the Laws of 1875.

4. That your petitioner has complied in all respects with the conditions and requirements imposed upon it by and pursuant to each and all of the facts aforesaid, and has constructed, maintained, and operated a railway which it was authorized to construct, maintain, and operate as aforesaid from Trinity Place (then known as New Church Street) at Morris Street to Eighth Avenue, River Street, and from Pearl Street at New Bowery to Second Avenue at Harlem River, and from the junction of 53d Street through and along Sixth Avenue to West 59th Street, said point being named for that purpose in the routes aforesaid, and said railway following said routes and passing over the portions of the streets and avenues recited in the second paragraph hereto, and adjacent portions of streets intersecting the same, and that your petitioner now operates its railway by its lessee the Manhattan Railway Company.

5. That your petitioner is now advised and believes that its title to a portion of the streets and avenues aforesaid and to the easements over the same is defective, and that certain interests thereunder have not been acquired by it, namely, the interest now owned by the person hereinafter named.

6. That for the purpose of its incorporation, to wit, to construct, maintain, and operate its said railway, including its roadway, switches and sidings, stations, depots, storehouses and places of storage, engine-houses, car-houses and machine shops, for its use as an elevated railway, there is required so much of the property, easement, and other interest in the streets aforesaid in this paragraph hereafter described as has been taken by your petitioner for the purposes in this paragraph hereinafter specified, during the existence of your petitioner, and of each of its successors and assigns as an elevated railway corporation, and so long as the said streets or any of them shall be used and maintained as public streets, highways or thoroughfares, that is to say : (insert description of property).

Wherefore, your petitioner prays that to enable it to acquire title to the property, easement, or other interests so taken by your petitioner the court will make an order for the appointment of three disinterested and competent persons, who reside in the county of New York, and who are freeholders, commissioners to ascertain and appraise the compensation to be made to the owners of or persons interested in the property, easement, or other interests so taken by your petitioner, and that the court will make such further or other order in the premises as may be just,

Dated New York, June 26, 1890.

METROPOLITAN ELEVATED
RAILWAY COMPANY.

By DANIEL W. McWILLIAMS,

(Verification added.)

Secretary.

Art. 4. Appearance and Answer.

ARTICLE IV.

APPEARANCE AND ANSWER. §§ 3363, 3364, 3365.

§ 3363. Appearance of infant, idiot, lunatic, or habitual drunkard.

If a defendant is an infant, idiot, lunatic, or habitual drunkard, it shall be the duty of his general guardian, committee, or trustee, if he has one, to appear for him upon the presentation of the petition and attend to his interests, and in case he has none, or in case his general guardian, committee, or trustee fails to appear for him, the court shall, upon the presentation of the petition and notice, with proof of service, without further notice, appoint a guardian *ad litem* for such defendant, whose duty it shall be to appear for him and attend to his interests in the proceeding, and, if deemed necessary to protect his rights, the court may require a general guardian, committee, or trustee, or a guardian *ad litem* to give security in such sum and with such sureties as the court may approve. If a service other than personal has been made upon any defendant, and he does not appear upon the presentation of the petition, the court shall appoint some competent attorney to appear for him and attend to his interests in the proceeding.

§ 3364. Appearance.

The provisions of law and of the rules and practice of the court relating to the appearance of parties in person or by attorney in actions in the Supreme Court shall apply to the proceeding from and after the service of the petition, and all subsequent orders, notices, and papers may be served upon the attorney appearing and upon a guardian *ad litem* in the same manner and with the same effect as the service of papers in an action in the Supreme Court may be made.

§ 3365. Answer; what to contain.

Upon presentation of the petition and notice, with proof of service thereof, an owner of the property may appear and interpose an answer, which must contain a general or specific denial of each material allegation of the petition controverted by him, or of any knowledge or information thereof sufficient to form a belief or a statement of new matter constituting a defence to the proceeding.

The trustees of a village may, by resolution, discontinue proceedings for the extension of a street, but cannot subsequently restore such proceedings by rescinding such resolution, as against interested persons who, in the meantime, have acquired new rights by legislative enactment. *Matter of Folts Street*, 29 App. Div. 69; *sub nom. Village of Herkimer v. N. Y. C. & H. R. R. Co.*, 51 N. Y. Supp. 390, 85 St. Rep. 390. The trustees of a village have no power, by resolution, to discontinue a special proceeding for the extension of a street while an appeal is pending therein, without consent of the opposite parties and leave of the court; and such resolution has no effect upon such appeal. *Matter of Folts Street*, 29 App. Div. 69; *sub nom. Village of Herkimer v. N. Y. C. & H. R. R. Co.*, 51 N. Y. Supp. 390, 85 St. Rep. 390.

Art. 4. Appearance and Answer.

Where a statute authorizing the taking of certain pieces of land described therein by metes and bounds for public parks in New York City gives the commissioners discretion to take so much as they shall deem advisable, no particular portion of the land described in the act can be said to be taken for public use until the commissioners have finally acted upon it in the manner prescribed by the statute. *Matter of Mayor*, 24 App. Div. 7, 49 Supp. 119, 83 St. Rep. 119. The effect of chapter 697, Laws 1867, under the authority of which the commissioners of Central Park closed the Bloomingdale road, was merely to extinguish public easements; the act did not affect private easements nor the rights of abutting owners in the land covered by such road, nor were such private easements destroyed by chapter 1006, Laws 1895. *Matter of Bd. of Education*, 24 App. Div. 117, 48 Supp. 1061, 82 St. Rep. 1061.

The provisions of chapter 670, Laws 1869, that "if any building shall be erected on the line of any avenue or street as laid out on said plan after the filing of said map, no compensation shall be paid to the owner thereof on the opening of said street," are unconstitutional. *German-American Real Estate Title Guarantee Co. v. Myers*, 32 App. Div. 41, 52 Supp. 449, 86 St. Rep. 449. Chapter 490, Laws 1883, is not unconstitutional because it provides for taking private property for public use without making immediate compensation, as the provision for the issue of city bonds to pay such damages amply compensates the property owner. *Matter of Gilroy*, 32 App. Div. 216, 52 Supp. 990, 86 St. Rep. 990. Section 3358 defines the term owner to mean "all persons having any estate, interest, or easement in the property to be taken, or any lien, charge, or incumbrance thereon." It follows that a mortgagee of property proposed to be taken is entitled to notice of the proceedings. *Matter of the Opening of Oneida Street*, 22 Misc. 240.

Where a city charter provides that no notice of condemnation proceedings shall be given to any one, except such as may be derived from the publication and subsequent service upon owners or persons having an interest of a copy of the resolutions of the common council declaring that it intends to take certain property, etc.; and where the charter does not require a notice to be given that any person or party in interest can appear at any time or place, and where it provides for no notice of the proceed-

Art. 4. Appearance and Answer.

ings before the commissioners, or any opportunity to be heard, and where no notice is required to be given of the commissioner's report, etc., the appointment of commissioners would violate the constitution, which forbids private property being taken for public use without just compensation, and without due process of law. *Matter of the Opening of Oncida Street*, 22 Misc. 236, 49 Supp. 828, 83 St. Rep. 838. A proceeding by a water company to acquire land, brought under § 83 of the Transportation Corporations Law, must be dismissed on failure to prove the filing of the survey and map required by the section. *Matter of Citizens' Water Works Co.*, 32 App. Div. 54, 52 Supp. 473, 86 St. Rep. 473.

Under the charter of the city of Johnstown, the city is authorized to take only such land as is necessary to lay out, open, and extend streets in said city, and if it already owns any land within the line of the proposed street or land therein has been given to it, such lands need not be condemned. *City of Johnstown v. Wade*, 30 App. Div. 5, 51 N. Y. Supp. 763, 85 St. Rep. 763. While it is more convenient and less expensive to include all lands and owners in one proceeding, it is not necessary; separate applications may be made to the court as to each. *City of Johnstown v. Wade*, 30 App. Div. 5, 51 N. Y. Supp. 763, 85 St. Rep. 763. In condemnation proceedings, an objecting land owner, who, by verified answer, puts in issue certain facts alleged in the application, and denies that any power has been given to take the land in question for the reason that the land is already occupied for a public purpose, is entitled to have the question thus presented decided, before commissioners of estimate and assessment are appointed to determine and assess the damages. *Matter of Mayor*, 22 App. Div. 124, 47 Supp. 965, 81 St. Rep. 965.

Submission to the voters of a village of the question whether a lighting system shall be established is a condition precedent to the authority of its board of water commissioners, under chap. 680, Laws 1894, to acquire by condemnation proceedings a lighting system existing in the village, and unless such question has been submitted, such proceedings are absolutely void. *Matter of Village of Le Roy*, 23 Misc. 53, 50 Supp. 611, 84 St. Rep. 611. Submission of the question whether the taxes authorized by the statute shall be levied and collected is not authorized and is not an equivalent of the submission of the question whether a lighting

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system shall be established. *Matter of Village of Le Roy*, 23 Misc. 53, 50 Supp. 611, 84 St. Rep. 611. Where the city charter provides that compensation for lands taken for a street shall be made to owners and also to persons having an interest in the property, mortgagees of the land are entitled to notice. *Matter of Onida Street*, 22 Misc. 235, 49 Supp. 828, 83 St. Rep. 828.

Where the petitioner fails to comply with the provisions of § 3360, the court may properly sustain oral objections to the application. *Erie & Cent. N. Y. Rd. Co. v. Walsh*, 1 App. Div. 140, 37 Supp. 996, 73 St. Rep. 539. An answer in condemnation proceedings which contains a denial of any knowledge or information sufficient to form a belief as to the allegation that petitioner is a corporation, raises an issue which the petitioner must meet by proof, and such issue is not waived by the admission on the trial that the petitioner's officers were as stated in the petition. *Matter of Broadway & 7th Av. Rd. Co.*, 73 Hun, 7, 57 St. Rep. 108, 25 Supp. 1080.

By proceeding with the matter, a party waives any objection to the validity of the proceedings in a street opening which he might have, and which he should have made when the commissioners were appointed. *Matter Lexington Ave. Ry. Co.*, 44 St. Rep. 307, 17 Supp. 870. The fact that a railroad company, seeking by condemnation a right of way in a street, has erected illegal structures, can be taken advantage of only by property owners who have been affected by such structures. *In re Met. Elec. Ry. Co.*, 12 Supp. 506.

To bind an infant land owner it is necessary that some proper person should be appointed as guardian or attorney to attend personally to the interests of the infant upon the appraisal. *Hotchkiss v. Auburn & R. R. Co.*, 36 Barb. 600.

If the use of the land sought to be accomplished, through the exercise of the right of eminent domain, is not restricted to private parties or private interests, but is open to the whole public, it is no valid objection that it will benefit one person or class of persons more than others, or that it originated through private interests, and that it intended to some extent to subserve private purposes; and thus the public use of a natural waterway, to float logs from one part of the State to the great lakes, is a public use within the meaning of the constitution, and the validity of the act is not open to question on the ground that the use is not public. *Matter of Burns*, 155 N. Y. 26.

Art. 5. Trial and Judgment.

ARTICLE V.

TRIAL AND JUDGMENT. §§ 3367, 3369.

§ 3367. Trial of issues.

The court shall try any issue raised by the petition and answer at such time and place as it may direct, or it may order the same to be referred to a referee to hear and determine, and upon such trial the court or referee shall file a decision in writing, or deliver the same to the attorney for the prevailing party, within twenty days after the final submission of the proofs and allegations of the parties, and the provisions of this act relating to the form and contents of decisions upon the trial of issues of fact by the court or a referee, and to making and filing exceptions thereto, and the making and settlement of a case for the review thereof upon appeal, and to the proceedings which may be had in case such decision is not filed or delivered within the time herein required, and to the powers of the court and referee upon such trial, shall be applicable to a trial and decision under the title.

§ 3369. [Am'd, 1895.] Judgment; costs when to defendant; commissioners.

Judgment shall be entered pursuant to the direction of the court or referee in the decision filed. If in favor of the defendant, the petition shall be dismissed, with costs to be taxed by the clerk at the same rates as are allowed, of course, to a defendant prevailing in an action in the Supreme Court, including the allowances for proceedings before and after notice of trial. If the decision is in favor of the plaintiff, or if no answer has been interposed and it appears from the petition that he is entitled to the relief demanded, judgment shall be entered, adjudging that the condemnation of the real property described is necessary for the public use, and that the plaintiff is entitled to take and hold the property for the public use specified, upon making compensation therefor, and the court shall thereupon appoint three disinterested and competent freeholders, residents of the judicial district embracing the county where the real property or some part of it is situated, or of some county adjoining such judicial district, commissioners to ascertain the compensation to be made to the owners for the property to be taken for the public use specified, and fix the time and place for the first meeting of the commissioners. Provided, however, that in any such proceeding instituted within the first or second judicial district such commissioners shall be residents of the county where the real property, or some part of it, is situated, or of some adjoining county. If a trial has been had, at least eight days' notice of such appointment must be given to all the defendants who have appeared. The parties may waive, in writing, the provisions of this section as to the residence of the commissioners, and in that case they may be residents of any county in the State. Where owners of separate properties are joined in the same proceeding, or separate properties of the same owner are to be condemned, more than one set of commissioners may be appointed.

L. 1895, ch. 530.

If the petition does not state the facts required by the section to be stated, an objection in that regard can be raised preliminarily in effect by way of demurrer, and should be disposed of before proceeding to the merits. If such objection is well taken, the proceeding is dismissed, unless a proper cause for amendment is shown. If such objection is overruled, then any defence to the proceeding by way of denial of facts in the petition or new matter

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outside, may be set up by affidavit or answer, and the issues so formed are to be tried. *Matter of N. Y., W. S. & B. R. R. Co.*, 64 How. 217. It may be shown on presenting the petition that it is not properly verified, or that it does not appear that the company has been unable to agree with the owner. *N. Y. & Erie R. R. Co. v. Corcy*, 5 How. 177.

The objection that neither the petition nor the map filed in the office of the county clerk shows what extent of land was to be taken, or anything more than a line showing the direction of the proposed railroad, should be raised on presentation of the petition. *Matter of N. Y. & Jamaica R. R. Co.*, 21 How. 434. The point may be raised that neither the petition nor map referred to in the petition, as filed in the county clerk's office, shows what extent of land is to be taken, or anything more than a line indicating the direction of the proposed railroad. *Matter of Buffalo & S. L. R. R. Co. v. Reynolds*, 6 How. 96.

The court may appoint commissioners to appraise all the lands proposed to be taken in a county, although owned by different parties. The statute authorized a joint commission, comprehending all the land owners included in one petition, and there is nothing in the statute to prevent several owners being included in one petition. *Troy & Rutland R. R. Co. v. Cleveland*, 6 How. 238. Where a railroad company makes application to acquire land, in addition to what is required for its roadway, and objections are made by the owner coupled with a denial of the specific allegations of the petition, respecting the purposes for which the road is required, the burden is upon the petitioner of proving the special circumstances alleged in support of the averment that it requires the land. The provision of the act authorizing the land owner to disprove the allegations of the petition was intended to enable him to introduce proof on his part to meet that offered by the petitioner, and to disprove allegations of the petition capable of being disproved. As to the special circumstances lying within the knowledge of the petitioner, it is put to its proof if the owner show sufficient cause against the petitioner. *Matter of N. Y. Central R. R. Co.*, 66 N. Y. 407. It is, however, said, in *Matter of Petition of N. Y. Bridge Company*, 4 Hun, 635, that the burden of proving by legal evidence that the facts alleged in the petition are not true, is by this section cast upon the owner of the land, and an affidavit or answer is not sufficient for that purpose.

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The legal existence of the corporation is at the foundation of its right to acquire property under the right of eminent domain; it is a fact which it is compelled to allege in its petition, and which may be controverted. If, therefore, by non-performance of a condition of its charter, the corporation has forfeited or lost its corporate rights and powers, the fact may be averred by any one whose land or property is sought to be appropriated in answer to the application. So held on reversing order appointing commissioners of appraisal. *Matter of Brooklyn, etc., R. R. Co.*, 72 N. Y. 245. It is held that it is not competent to inquire into an alleged improper issue of stock, if it appears that valid subscriptions to the extent required by the statute have been made, and 10 per cent. thereon paid in cash. *Matter of Staten Island Transit Co.*, 38 Hun, 381. Where the petition averred the due incorporation of petitioner, and a counter-affidavit denied any knowledge or information sufficient to form a belief, *held*, that, considered simply in an affidavit, it was not a denial of the averment, that, treated as an answer, there was not such a denial as put the petitioner to proof of its incorporation; Code, § 1776; that, therefore, conceding that the land owner might, without a formal denial, disprove the fact, the burden was upon him of proving that the petitioner was not a corporation. *Matter of N. Y., Lackawanna & W. R. R. Co. v. Union Steamboat Co.*, 99 N. Y. 12, affirming 35 Hun, 220. A denial of the intention of a railroad company to, in good faith, construct and finish its road, made by the owner of the property sought to be taken, raises an issue for trial before commissioners can be appointed, and puts the burden of proof upon the company. *Matter of Staten Island Rapid Transit R. R.*, 20 Week. Dig. 15.

Where the court failed to appoint commissioners or to fix a date for the hearing, it was held that it had power by § 3369 of the Code to supply the omission. *Matter of Manhat. Ry. Co. v. Stroub*, 68 Hun, 90, 52 St. Rep. 44, 22 Supp. 602. It was held that an order appointing commissioners, granted five days before the time for the first hearing and entered three days before that time, did not give sufficient time to those who had appeared, under the requirements of § 3369 of the Code. *Manhat. Ry. Co. v. Stroub*, 68 Hun, 90, 52 St. Rep. 44, 22 Supp. 602.

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Judgment and Order Appointing Commissioners.

(Caption.)

In the Matter of the Petition of the Brooklyn
Elevated Railway Company to acquire title,
etc., in the real estate of, etc., etc. } 147 N. Y. 344.

The above-named plaintiff having duly applied to this court by a petition duly served upon the defendants above named for a judgment adjudging that the public use requires the condemnation of real property described in said petition, and for the appointment of commissioners of appraisal to ascertain and appraise the value of said property, and for further relief, and the said defendants above named having answered the said petition, and the issue raised by said answer having been referred to Horatio C. King, Esq., as sole referee, to hear and determine the same, and the said referee having duly rendered his report to this court, and judgment having been duly entered thereon, in which it is adjudged and decreed, that the plaintiff is entitled to take and hold the interest and easements described in the petition herein, appertaining to the appraisals of the property owned by defendants above named and described in said petition, upon making compensation therefor, and the plaintiff having applied to this court for the appointment of said commissioners of appraisal, upon reading and filing the affidavit of Francis Farquhar, verified the 9th day of March, 1893, and due proof of the service of notice of said application upon Stephen M. Hoyer, Esq., the attorney for the defendants above named, and after hearing counsel for the plaintiff in support of said motion, and Stephen M. Hoyer in opposition thereto, and due deliberation being had, it is

Ordered, that John H. Kemble, Charles M. Vail, and Simon B. Chittenden, Esq., three disinterested and competent freeholders, residing in the city of Brooklyn and county of Kings, be and they are hereby appointed commissioners of appraisal to ascertain and appraise the compensation to be made to Henry F. Harris and John Flynn, defendants herein, for the interests and easements in the property respectively owned by them, adjudged to be taken in said judgment, entered and filed herein on the 8th day of February, 1893, for the public use therein specified. And it is also

Ordered, that the first meeting of the said commissioners be held at No. 183 Montague Street, in the city of Brooklyn, on the 28th day of March, 1893, at 10 o'clock in the forenoon of that day.

Enter.

E. M. C.

Order Appointing Commissioners on Application of Owner.

(Caption.)

In the Matter of the Petition of George Clark
for the Appointment of Commissioners, etc. } 148 N. Y. 1.

On reading and filing the petition of George Clark, verified the

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10th day of March, 1892, by which it appears that the water commissioners of Amsterdam, pursuant to the authority vested in them by an act of the legislature of the State of New York, entitled "An act to provide for a supply of water in the village of Amsterdam, and to exempt said village from the provisions of chapter 181 of the Laws of 1875, passed April 14th, 1881, and acts amendatory thereof and supplemental thereto," for taking and appropriating certain lands, tenements, and hereditaments of the said petitioner in the said petition described, situated in the county of Fulton, and on proof of due and personal service of a copy of said petition and notice of this motion more than ten days since, upon the president and secretary of the water commissioners of Amsterdam; and on motion of Borden D. Smith, of counsel for petitioner, after hearing C. S. Nisbet, of counsel appearing for the water commissioners of Amsterdam, and reading the affidavit of C. S. Nisbet.

Ordered, that William Green, Thomas G. Foster, and James T. Bradford, three disinterested citizens of the said county of Fulton, freeholders, be and they hereby are appointed commissioners of assessment under and pursuant to the provisions of the aforesaid act to determine the damage sustained by the said petitioner, George Clark, by reason of the taking of his lands, tenements, and hereditaments, rights or property, by the said The Water Commissioners of Amsterdam, for the purposes of the aforesaid act; and the sum which will be a just compensation to the said George Clark, petitioner, for the appropriation to the purposes of said act of any property, rights, or privileges belonging to him, that may be required for the purposes of the said act; and for the title or use of any such property.

Said commissioners are at liberty to sit in Montgomery County for the purpose of hearing testimony of witnesses on the part of the Water Commissioners of Amsterdam residing in said county.

Let this order be entered in the Fulton County clerk's office.

JOHN R. PUTMAN,

J. S. C.

ARTICLE VI.

THE COMMISSIONERS AND THE AWARD.

SUB. 1. THE HEARING. § 3370.

2. THE AWARD.

SUB. 1. THE HEARING. § 3370.

§ 3370. [Am'd, 1898.] Duties and powers of commissioners.

The commissioners shall take and subscribe the constitutional oath of office. Any of them may issue subpoenas and administer oaths to witnesses; a majority of them may adjourn the proceeding before them, from time to time in their discretion. Whenever they meet, except by appointment of the court or pursuant to adjournment, they shall cause at least eight days' notice of such meeting to be given to the defendants who have appeared, or their agents or attorneys. They shall view the premises described in the petition, and hear the proof and allegations of the parties, and reduce the testimony taken by them, if any, to writing, and after the testimony in each case

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is closed, they, or a majority of them, all being present, shall, without unnecessary delay, ascertain and determine the compensation which ought justly to be made by the plaintiff to the owners of the property appraised by them; and, in fixing the amount of such compensation, they shall not make any allowance or deduction on account of any real or supposed benefits which the owners may derive from the public use for which the property is to be taken, or the construction of any proposed improvement connected with such public use. But in case the plaintiff is a railroad corporation and such real property shall belong to any other railroad corporation, the commissioners, on fixing the amount of such compensation, shall fix the same at its fair value for railroad purposes. They shall make a report of their proceedings to the Supreme Court with the minutes of the testimony taken by them, if any; and they shall each be entitled to six dollars for services for every day they are actually engaged in the performance of their duties, and their necessary expenses, to be paid by the plaintiff; provided, that in proceedings within the counties of New York and Kings such commissioners shall be entitled to such additional compensation not exceeding twenty-five dollars for every such day, as may be awarded by the court.

L. 1898, ch. 384. In effect Sept. 1, 1898.

A proceeding taken by the city of New York under the Consolidation Act to acquire lands is, within the definition contained in § 3334 of the Code, a special proceeding, and should be heard as such proceedings are ordinarily heard, although no particular method of procedure is prescribed by that act. *Matter of Mayor*, 22 App. Div. 124, 47 Supp. 965, 81 St. Rep. 965. The right of the owner of a farm of which a portion is to be taken for the construction of a railroad to ride on such road or transport part of his property thereon, upon payment of the established tolls, is a right of "public use," the benefits arising from which cannot be considered by commissioners appointed in the condemnation proceedings. *Lewiston & Youngstown Frontier R. R. Co. v. Ayer*, 27 App. Div. 571, 50 Supp. 502, 84 St. Rep. 502.

Where land used for business purposes is taken, the owner is entitled to show the general character of the business, but not the profits resulting therefrom. *Matter of Gilroy*, 26 App. Div. 314, 49 Supp. 798, 83 St. Rep. 798. Commissioners appointed in condemnation proceedings may properly be influenced in their appraisal by their conclusions reached from their personal inspection and examination of the premises. *Matter of Daly*, 26 App. Div. 326, 49 Supp. 795, 83 St. Rep. 795.

Proceedings before commissioners appointed in condemnation proceedings are not conducted on the strict lines of trials before courts. *Matter of Staten Island and Midland R. R. Co.*, 22 App. Div. 366, 48 Supp. 274, 82 St. Rep. 874. In proceedings to condemn land for a public improvement the owner may show the value

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of the land for any purpose for which it may be used, although he may have put it to a different use. *Matter of Gilroy*, 26 App. Div. 314, 49 Supp. 798, 83 St. Rep. 798. Under the provisions of chapter 490, Laws 1883, the aqueduct commissioners were not confined to an area which would be overflowed by reason of the construction of the dam across the Croton River, but were authorized to include land likely to be overflowed in extraordinary freshets and also land necessary to protect the water supply from pollution or injury. *Matter of Gilroy*, 32 App. Div. 216, 52 Supp. 990, 86 St. Rep. 990.

Where several adjournments were had on account of the failure of the land owner to appear, the commissioners were justified in taking testimony, and a motion to open the default was properly denied. *Matter Mt. Ry. Co.*, 72 Hun, 638, 25 Supp. 399, 55 St. Rep. 760. Commissioners in proceedings to condemn land for a street have jurisdiction to try the question of easements in favor of abutting property owners. *Matter of Ethel St.*, 3 Misc. 403, 24 Supp. 689. The power to adjourn rests in the majority of the board, or the commissioners. *In re Newland Ave.*, 15 Supp. 63, 38 St. Rep. 796. Commissioners are authorized to inspect the property, and their finding will not be disturbed unless it is apparent that injustice has been done. In making the award, they are not bound by the evidence of experts, but may act upon their own conclusion derived from such inspection. *Matter of N. Y. Elev. Ry. Co.*, 35 St. Rep. 944, 12 Supp. 858; *Matter of the Dept. of Public Parks*, 53 Hun, 280, 25 St. Rep. 9, 6 Supp. 750.

The burden of proof rests upon the petitioner to prove allegations which are denied by the answer. *City of Syracuse v. Benedict*, 86 Hun, 343, 33 Supp. 944, 67 St. Rep. 614. The value of a water power which depends upon locality and adaptability to the use made of adjoining property cannot be shown by evidence of the price paid for similar property. *Matter of Thompson*, 127 N. Y. 463, 40 St. Rep. 200, affirming 24 St. Rep. 433, 5 Supp. 370.

In proceedings to condemn property used as a mill site, evidence as to the amount of business at the mill and the profits derived therefrom is inadmissible. *Matter of Newton*, 45 St. Rep. 18, 19 Supp. 573. In a proceeding to acquire water rights, the solvency of the petitioner is immaterial, and evidence upon that subject inadmissible. *Matter of P. Water-works*, 44 St. Rep. 925,

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17 Supp., 661. Testimony as to what was done by another surveyor on similar work in his report is immaterial. *Matter of Depart. of Public Parks*, 32 St. Rep. 832, 11 Supp. 176. Where claimant asks damages for injuries to water privileges, buildings, etc., caused by blasting, and an easement only had been taken in the land, evidence was excluded by the commissioners as to the costs of the buildings, etc., claimed to have been injured, *held*, proper. *Matter of Thompson*, 35 St. Rep. 266, 12 Supp. 182 ; see also *Matter of Thompson*, 57 Hun, 419, 32 St. Rep. 969, 10 Supp. 705. The admission of evidence which could not be received by the court is not necessarily fatal to the determination of commissioners of appraisal. *Matter of Elev. Ry. Co.*, 29 St. Rep. 190, 8 Supp. 707.

The commissioners are required "to view the premises and hear the proofs and allegations of the parties;" having done this, they are required "without any unnecessary delay to determine the compensation which ought justly to be made." The order in which they shall proceed is a matter left entirely to their discretion. They have no right to omit to hear the proofs and allegations of the parties, but whether they shall hear the proof before or after viewing the premises is for them to decide; so as to whether one party or the other shall be first heard is for them to determine, and the parties are concluded by their decision. *Albany Northern, etc., R. R. Co. v. Lansing*, 16 Barb. 68. Where objections are made by the owner, coupled with a denial of the allegations of the petition, the burden is on the petitioner of adducing proof in support of the petition. *Matter of N. Y. Central R. R. Co.*, 66 N. Y. 407. The party whose land is taken and who claims damages therefor has the right to the opening and closing argument in the proceedings; the rule is, that the party entitled to unliquidated damages, there being no other issue, has the right to open and close. *Matter of N. Y., L. & W. R. R. Co.*, 33 Hun, 148 ; affirmed without opinion, 98 N. Y. 664. It is also held below that a party who has, by putting in a general appearance and proceeded without objection, submitted himself to the jurisdiction of the court, cannot afterward raise objection to the sufficiency of the verification to the petition. *Lackawanna, etc., R. R. Co., v. Schen*, 33 Hun, 148.

An error in the admission of evidence is not cured by the certificate of one of the commissioners that it did not affect the

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report. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 29 Hun, 1. It is the right of the land owner to produce before the commissioners, and the duty of the commissioners to hear, any and all evidence which would be competent in a court of law on similar questions. *Rochester & Syracuse R. R. Co. v. Buddlong*, 6 How. 467. And the owner is entitled to full opportunity to be heard. *N. Y. & Erie R. R. Co. v. Colburn*, 6 How. 223. While the commissioners are required to view the premises as well as hear the proofs and allegations of the parties, they are to act upon their view as well as the evidence. *Troy & Boston R. R. Co. v. Lee*, 13 Barb. 169. They are, however, controlled by the established rules of evidence. *Troy & Boston R. R. Co. v. Northern Turnpike Co.*, 16 Barb. 100; *Matter of Utica & C. R. R. Co.*, 56 Barb. 456. An award made without testimony would be regular. The commissioners must decide according to their own judgment. *Rondout & Oswego R. R. Co. v. Deyo*, 5 Lans. 298; *Rondout & Oswego R. R. Co. v. Field*, 38 How. 187. The fact that, during the examination of the premises by the commissioners, one of them was for a time separated from the others, is not an irregularity for which the award will be set aside. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 63 How. 265.

The compensation for damages should not be restricted to the actual value of the land taken, nor to the depreciation of the value caused by the separation of the piece from the whole, but to the difference in value of the property before and after the improvement. Mills on Eminent Domain, § 159, citing numerous authorities. Where the owner's whole tract is taken, its market value at the time of taking is the measure of compensation; where only a part of the lot is taken, it must be treated not as a separate and independent piece, but in its relation to the part not taken. The general rule of damages which covers the part taken, and the injury to the remaining land, is that the owner is entitled to the difference between the market value of the whole lot or tract before the taking and the market value of what remains to him after such taking. It seems, in proceedings by a railroad corporation to acquire a right to lay its tracks in a street or highway, the fee of which is in the owner of the adjoining land, the proper compensation is, first, the full value of the land taken; second, a fair and adequate compensation for all the injury the owner has sustained and will sustain by the making of

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the railroad over his land; and for this purpose it is proper to ascertain the effect the conversion of the street into a railroad track will have upon the residue of the owner's land. *Henderson v. N. Y. Central R. R. Co.*, 78 N. Y. 423. In making appraisals of the damages sustained by a person whose property is taken for the purpose of a railroad, the true rule is to determine what will be the effect of the proposed change on the market value of the property remaining. The proper inquiry is, what is the entire property now fairly worth in the market, and what will that part not taken be worth when the improvement is made. *The Troy & Boston R. R. Co. v. Lee*, 13 Barb. 169.

The intention of the legislature was to confine the commissioners to an estimate of the price to be paid by the railroad company to the owner of the land proposed to be taken, regardless of the benefits which might result to him as the owner of adjoining land in consequence of the contemplated improvement. It is a proper rule for the commissioners to adopt that they will allow full compensation for the land taken, including therein the damages to the adjacent land by reason of such taking, and that they will not allow consequent and prospective damages. They are to consider how the taking, not how the use, of the land will affect the residue of the owner's land, and award damages accordingly. *Albany & Northern R. R. Co. v. Lansing*, 16 Barb. 68. The office of the commissioners is to determine the compensation to be awarded to the owner of the real estate proposed to be taken; they are to decide questions of present value, and not to speculate in respect to the probable consequences of constructing and operating a railroad. *The Canandaigua & N. F. R. R. Co. v. Payne*, 16 Barb. 273. The proper inquiry is, what is the fair marketable value of the whole property, and what will be the fair marketable value of the property not taken. The difference will be the true amount of the compensation to be awarded. *Black River & M. R. R. Co. v. Barnard*, 9 Hun, 104.

For the rule when land is taken for a highway, with right to use the highway for a railroad, see *Matter of Prospect Park & C. I. R. R. Co.*, 13 Hun, 345; S. C. 16 id. 261. It is competent to show, where land is taken for a specific use, as a railroad, that the land not taken is depreciated in value by the use of the land taken, and if that depreciation consists in the imposition of expense upon the owner of such lands, what that expense will

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be. *Matter of Bloomfield, etc., Gas-Light Co.*, 1 T. & C. 549. When land is taken for the construction of a railroad without the consent of the owner, the compensation therefor is not limited to the depreciation of the residue of the lot from which it is taken by such separation, but the owner is entitled to recover also for any depreciation caused by the use to which it is appropriated; where only part of a lot is taken, the question is, what will the whole bring in the market after the railroad is constructed, and everything which will depreciate the value of that residue is to be taken into account. The damages to be paid are to be determined by the detriment occasioned to the owner of the land taken, and the amount thereof should be neither increased or diminished by the fact that the land to be taken was peculiarly well situated or adapted to the uses of a railroad. *Matter of The Boston, H. T., etc., R. R. Co.*, 22 Hun, 176. If it is more exposed to fire, if access is more difficult, if its use is more inconvenient, if its value is depreciated by smoke, noise, or increased danger, these are all to be considered. The question is, what is the market value of the whole without the railroad; what is the market value of the remainder with the railroad. *Matter of Utica, etc., R. R. Co.*, 56 Barb. 457. See, also, *Troy & Boston R. R. Co. v. Lee*, 13 id. 169; *Rood v. N. Y. & Erie R. R. Co.*, 18 id. 80. The same rule is also held in 1 T. & C. 549, *supra*, as to the consideration of damages to remaining land by that taken for railroad purposes, but is contrary to the rule in *Albany & Northern R. R. Co.*, 16 Barb. 68; *Troy & B. R. R. Co. v. Northern Turnpike Co.*, id. 100; *Canandaigua & Niagara Falls R. R. Co. v. Payne*, id. 273; *Black River & M. R. R. Co. v. Barnard*, 9 Hun, 104; *Matter of Prospect Park & C. I. R. R. Co.*, 13 id. 345; *Matter of Union Village, etc., R. R. Co.*, 53 Barb. 457; *Matter of N. Y. Elevated R. R. Co.*, 36 Hun, 427. But see, also, as sustaining 56 Barb. 456, *supra*, *Matter of N. Y. C. & H. R. R. Co.*, 15 Hun, 63. The rule upon which commissioners should determine the compensation which ought justly to be made by the company to the owner is well settled by authority. The owner should be awarded the market price of the land already taken, and, in addition thereto, the depreciation in the market value of the lands remaining as compared with their former market value. *Matter of N. Y., W. S. & B. R. R. Co.*, 29 Hun, 609; *Matter of N. Y., W. S. & B. R. R. Co.*, 35 id. 262.

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The question, "What, in your opinion, will be the effect of the proposed improvements upon the land proposed to be taken in these proceedings upon the adjoining lands?" is not admissible under the statute, which provided that the commissioners shall not make any allowance or deduction on account of any real or supposed benefits which the parties interested may derive from the construction of the proposed railroad. *Matter of N. Y., W. S. & B. R. R. Co.*, 35 Hun, 261. Compensation is not to be made to one whose lands are not taken, although he suffers consequential damages by reason of the construction of the road. *Barnes v. Southside R. R. Co.*, 2 Abb. (N. S.) 415; *Arnold v. H. R. R. Co.*, 49 Barb. 108.

In case of a dwelling-house and ten acres of land adjacent, and occupied in connection, separated by a turnpike, the owner of the land was held entitled to have the damages to the whole property estimated, including that on the west side of the turnpike. The land should have been treated as a whole and the damages assessed on a whole. *N. Y., W. S. & B. R. R. Co. v. Lefever*, 27 Hun, 537. Where, however, lands consisting of blocks of land were divided by a railroad already built, it was held no damages could be recovered for injury to property upon the opposite side of the track from that taken, and the damages were held to be: First, the value of the ground taken; second, the consequential damages, if any, to that portion of the land lying on the same side of the block as that taken. *Matter of N. Y. C. & H. R. R. Co.*, 6 Hun, 149. The rule laid down by Pierce, p. 212, is that a mere formal division into lots, or even division by a highway, does not prevent the different lots being treated as an entirety, where they are still used together and held for a common purpose. The owner cannot ask to have his land treated as several distinct lots for the purpose of increasing the damages, and yet ask that it shall be considered as one tract from which the railroad has taken a part for the purpose of securing damages on the whole. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 27 Hun, 151. Loss of business profits and good-will are not substantial grounds for damages, nor are they to be considered in estimating the injury caused by the taking of land. *Troy & Boston R. R. Co. v. Northern Turnpike Co.*, 16 Barb. 100; *Canandaigua & N. F. Co. v. Payne*, id. 273; *N. Y., W. S. & B. R. R. Co. v. Cosack* 35 Hun, 633. It was held, in *Matter of N. Y. Elevated Ry. Cases*,

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36 Hun, 427, that the owner is not entitled to compensation for the disturbance caused by the noise and vibration, or the annoyance of ashes, dust, cinders, and smoke incidental to the operation of an elevated railway any more than of a surface railway. As to the rule in such case, with respect to surface railways, the authorities collated, *Pierce on Railroads*, 217, sustain the doctrine that inconveniences from noise, smoke, etc., are not independent grounds of compensation, but when land is taken, may be admitted in estimating depreciation of balance. See the following authorities: *Radcliffe v. Brooklyn*, 4 N. Y. 195; *Gould v. Hudson R. R. Co.*, 6 id. 535; *Bellinger v. N. Y. Central R. R. Co.*, 23 id. 42; *Selden v. D. & H. Canal Co.*, 29 id. 634; *Coster v. Albany, etc., R. R. Co.*, 43 id. 399; *Brooklyn Park Commissioners v. Armstrong*, 45 id. 234.

In estimating the damages to which a lessee of premises, part of which he uses for drying goods manufactured in the rest, is entitled for the taking of his drying-ground for railroad purposes, the commissioners should consider the injury to the property as a whole, the difference in the value of the leasehold interest before and after the land is taken; but the willingness of the lessor to lease another piece of land, suitable for drying purposes, is not admissible. *N. Y., West Shore & B. Ry. Co. v. Bell*, 28 Hun, 426. Where valuable property was rendered difficult of access from the river by taking of lands and construction of railroad, it was held, it seems, that the proper measure of damages would be the expense of restoring communication with the river, destroyed by the construction of the road. *Matter of N. Y., W. S. & B. R. R. Co.*, 29 Hun, 646. It is competent to show how much other land of the same owner is injured by the use of that taken, and he may give evidence of the value of the land for any purpose for which it is adapted. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 29 Hun, 602. See this case as to rule of damages where part of stock farm was taken holding that measure of damages would be what it would cost to construct another track. The opinions or conjectures of witnesses as to the effect the use of the railroad will produce in frightening horses on a turnpike, or as to the necessity of deviating the line of a turnpike at another place, or the cost of diversion, or that a bridge ought to be built by a railroad company at a crossing, or as to the amount of damages the turnpike company will sustain by reason of the crossing of its

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road, are said to be inadmissible. *Troy & Boston R. R. Co. v. Northern Turnpike Co.*, 16 Barb. 100. Although the measure of damages for lands condemned for railroad purposes is not in any case the value which they will have in the hands of the corporation acquiring them for such purposes, yet where the lands have been improved, and where they have, in the hands of the owner, a special value for railroad purposes, and a franchise for their use for such purposes has been granted by the legislature, and they are held by the owner for such use, or for sale for such use, the market value of the land for the use of which it is especially adapted becomes the measure of damages and it is proper for the commissioners to receive and consider evidence of all improvements, the location of the track, and the value of the franchise. Technical errors committed by commissioners in the admission of evidence of value or damages will not affect the appraisal, where the court cannot see that the commissioners have erred in the principles which ought to govern such appraisal. An appraisal will not be set aside as excessive unless the excess is plain and palpable on the evidence. *Matter of Lackawanna & Western R. R. Co.*, 27 Hun, 116. It is said, in *Boom v. Patterson*, 98 U. S. 408, that the compensation is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future. It is said, *Matter of N. Y. Central & H. R. R. Co.*, 6 Hun, 154, that it is proper for the owner to show before the commissioners the purpose for which lots had been purchased by him, and for which they were intended to be used. See, also, *Rondout & O. R. R. Co. v. Deyo*, 5 Lans. 298. See, for the principle, *In re Furman Street*, 17 Wend. 649. In *Trustees of College Point v. Dennett*, 5 T. & C. 217, it is held that upon an appraisal of a pond under a statute for supplying water, etc., that the owner was entitled to show, upon the question of value, that there was not a pond within a radius of six miles that could be made a source of supply for cities and villages. The measure of damages was not limited to its use as a mill or ice-pond, but the owner was entitled to receive its value for any use. It is said, in *Furniss v. H. R. R. Co.*, 5 Sandf. 551, that all damages of every kind, naturally consequent upon the construction of a railroad, are presumptively included in the assessment. The commissioners must appraise the land

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at its actual value; they cannot make a reservation of easements and privileges to the owner, and when the award stated that it was based on the supposition, and made on the condition and with the understanding that the owners of the land might open a street across the railroad, it was held by the court that the appraisement was illegal, and that the inquisition should be set aside. *Hill v. M. & H. R. R. Co.*, 5 Den. 206; s. c. 7 N. Y. 152. See, however, *Ex parte Hartford & Conn. R. R. Co.*, 65 How. 133, holding that a company may petition for the appraisement of the surface only of the land required for its road. Where there is a mortgage upon the land taken and the company have erected valuable improvements thereon, *held*, on foreclosure and sale in parcels of the whole of the mortgaged premises, that the railroad company were bound to contribute to the payment of the mortgage debt if the same was not paid by the sale, in the inverse order of alienation of the other property covered by the mortgage, the full value of the piece of land taken and appropriated by them at the time of such appropriation, with interest thereon to the time of payment. *Dows v. Congdon*, 16 How. 571. Where, in pursuance of an act of the legislature, lands are taken by a municipal corporation for a public use, upon an appraisement and payment of their value to the holder of the fee, the corporation acquires an absolute right to them, divested of any inchoate right of dower existing in the wife. *Moore v. The Mayor of New York*, 8 N. Y. 110. The commissioners should determine the compensation to be made to a widow who has dower or life estate in lands taken (*Matter of William Street*, 19 Wend. 678), and also the compensation to be made to the mortgagee. *Matter of John Street*, *id.* 659. Where land is condemned for railroad purposes, a claim to a portion of the sum awarded as compensation made by the county for unpaid taxes upon the property cannot be maintained on any ground which would be insufficient in a direct proceeding by virtue of the assessment to support a sale of the property or uphold a tax title. *Matter of N. Y. Central & H. R. R. Co.*, 90 N. Y. 342, modifying 15 Week. Dig. 137. Change of ownership, pending proceedings, shall not affect the award, but it is to be made and perfected as if no conveyance had been made. Laws 1854, chap. 282, § 6. Where a tenant is in possession, the criterion of his damages is the amount by which the rental value of the land exceeds the rent re-

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served. *Matter of City of Buffalo*, 1 Shel. 408 (Buffalo Super.).

Commissioners have a right to view the premises in question and are entitled to act to some extent upon their judgment. *Matter of Metropolitan Elevated R. R. Co.*, 76 Hun, 375, 27 Supp. 756, 59 St. Rep. 194. They may disregard the testimony of witnesses and base their conclusion on knowledge and information derived from a view of the premises. *In re Kings Co. Elevated R. R. Co.*, 15 Supp. 516; *In re Department of Public Parks*, 6 Supp. 750.

The rule is well settled that commissioners appointed in condemnation proceedings will not be governed in regard to the admissibility of evidence by the strict rules obtaining in a court; they may review the premises and act on the knowledge thus acquired, unless they have pursued a course which has plainly been detrimental to the interests of the party appealing, and unless their award is manifestly unjust, it will not be interfered with. Commissioners are not to be governed exclusively by the evidence produced before them; they have a wider range and a larger discretion in receiving evidence than courts, and may base their conclusions upon a personal inspection of the premises. *In re N. Y. Elevated R. R. Co.*, 8 Supp. 707. The appointment of commissioners to award compensation under the Grade Crossing Act cannot be refused on the ground that the injury to property not actually taken was apparently small and the damages of little consequence. *Matter of Grade Crossing Commrs.*, 154 N. Y. 561, 49 N. E. Rep. 131.

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In determining the damages to be awarded for land taken for use in connection with the water supply of a city, the availability of the land for such use must be considered. *Matter of Gilroy*, 85 Hun, 424, 32 Supp. 891, 66 St. Rep. 208.

Where land is condemned for public use, the market value at the time when the act of appropriation was passed should govern, and owners are not entitled to interest upon the award from the passage of the act until the award is paid, nor should they be allowed for taxes paid during this period. *Matter of Dept. Public Parks*, 53 Hun, 280, 25 St. Rep. 9, 6 Supp. 750.

If the owner obtains the value of his property at the time his

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title and possession are taken away from him, he obtains all the compensation granted by the constitution. *Matter of Trustees, etc.*, 137 N. Y. 95, 50 St. Rep. 182, modifying 47 St. Rep. 932, 21 Supp. 233. An award for property along the river will exclude bulkhead rights. *Matter of Alexander Ave.*, 44 St. Rep. 546, 17 Supp. 933; *Langan v. The Mayor*, 59 Hun, 434, 37 St. Rep. 99, 13 Supp. 864. The restoration of a private road leading to docks upon a river is not the duty of a railroad company which has taken lands of the owner under the water, and the award must compensate him. *Kerr v. W. S. R. R. Co.*, 127 N. Y. 269, 37 St. Rep. 913.

It is not obligatory that an award should be greater than a mortgage on the property, the actual value only is to be fixed. *Matter of City of Brooklyn*, 73 Hun, 499, 56 St. Rep. 232, 26 Supp. 198. In proceedings to condemn, for a public street, land which is held by the owner subject to the right of passage of adjoining owners, the award of nominal damages is proper. *Matter of Adams*, 73 Hun, 581, 56 St. Rep. 234, 26 Supp. 422. Where the fee value of leased premises has been greatly increased by permanent improvements by the lessee in consideration of a reduced rent, it is not error for the commissioners to fix the fee value at a certain sum, and award a portion thereof to the lessee. *Matter of N. Y. & Brooklyn Bridge*, 19 Supp. 953. Where the fee of land which is subject to the right of passage of owners of adjacent lands, is taken in proceedings to open a street, the owner of such fee is entitled to substantial damages measured by the effect of such taking upon the value of his remaining property. *Matter of 173d St.*, 78 Hun, 487, 60 St. Rep. 758, 29 Supp. 205.

Where land embraced in a road is taken for a street and is devoted to the same use, a nominal award only should be made. *Matter of Dept. Public Works*, 53 Hun, 280, 25 St. Rep. 9, 6 Supp. 750.

Although nominal damages may be sufficient where a city lays out a street over lands which have been previously offered by the owner to be dedicated to public use, it is not a rule of law that only nominal damages are to be given for the taking of the fee. *Matter of the Terrace*, 39 St. Rep. 270, 15 Supp. 775.

An award for land taken for a street which is part of an unopened street, laid out on a private map made by the owner of the land with reference to which he has made conveyances, but

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which does not appear on the official maps of the city, should be equitably divided between the owner of the fee and the abutting owners who have acquired easements thereon. *Matter of St. Nicholas Terrace*, 76 Hun, 209, 59 St. Rep. 109, 27 Supp. 765, affirmed, 143 N. Y. 621, 60 St. Rep. 476. Where the owners file a map of land laid out in streets, and containing a declaration that no dedication to public use is intended, and convey part of the land with reference to such streets, including in the conveyances land within the street line, the grantees acquire an easement in the land designated as streets, and the owners are only entitled to an award for the value of the land appropriated for the public use after deducting that of the private easement. *Matter of Adams*, 141 N. Y. 297, 57 St. Rep. 408.

A substantial award should be made to the abutting owners of a street in the city of New York, closed by condemnation proceedings: where the road-bed of the old road is concerned the same rule should apply. But nothing can be awarded for roads within the county of Westchester, and when it cannot be determined for whom an award should be made, it should run to unknown owners. *Matter of Dept. of Pub. Parks*, 53 Hun, 280, 25 St. Rep. 9, 6 Supp. 750. Where land taken for a public street is subject to an easement or right of way of the public or an individual, the award should pay not the full value of the property taken, but its value subject to such easement. *Matter of 116th St.*, 1 App. Div. 436, 37 Supp. 508, 73 St. Rep. 100. Where land is taken by eminent domain, the benefits may be set off not only against the damages to the remainder, but also against the value of the part taken. *Eldridge v. City of Binghamton*, 120 N. Y. 309, 30 St. Rep. 1007, affirming 42 Hun, 202, 4 St. Rep. 696. It is further held in this case, that the provision of the Federal constitution protecting property rights has no application to the exercise of the right of eminent domain by the State. Commissioners cannot make an award for the loss of an established business, nor for machinery as such, nor for a water power separated from the land. *Matter of Dept. of Public Parks*, 53 Hun, 280, 25 St. Rep. 9, 6 Supp. 750.

The rule of damages is the difference in value between the property as it was before the railroad is constructed, and as it will be after construction. The rule for an additional taking of land already subject to an easement of a public street for a rail-

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road, is only nominal. So held in the case of *Union Elev. Ry. Co. v. Jewett*, 30 St. Rep. 164, 8 Supp. 813.

Where a portion of a building has been taken, the proper measure of damages is the difference between the value of the building as it stood before and the value of the remaining portion after the improvement has been finished. *Matter of Lexington Avenue*, 44 St. Rep. 532, 17 Supp. 872. The inchoate right of dower of a wife must be recognized, and protected in all proceedings against her husband. *Matter of N. Y. & B. B. Co.*, 75 Hun, 558, 59 St. Rep. 613, 27 Supp. 597, affirmed, 60 St. Rep. 874.

But, however, where an award for land taken to lay out a highway was made to the plaintiff's husband instead of the plaintiff, the actual owner, it was held not to invalidate the proceedings, in *Mitchell v. Village of White Plains*, 62 Hun, 231, 41 St. Rep. 787, 16 Supp. 828. The rule of damages in proceedings under the act of 1883, to provide an increased water supply for the city of New York, is laid down in *Matter of Squire*, 125 N. Y. 131.

Where a sum is awarded for land taken, but no separate award to the owners of the minerals thereunder, an order confirming the report in part and sending it back to the commissioners to appraise the award between the owner of the minerals and of the surface, is proper. *Matter of Daly*, 88 Hun, 188, 34 Supp. 414, 68 St. Rep. 421. Provisions that all taxes and assessments which may be a lien shall be deducted from the award, is improper where no further consideration of the tax lien was had on the appraisal. *Matter of So. St. Paul St.*, 85 Hun, 473, 33 Supp. 141, 66 St. Rep. 766.

In proceedings to condemn the franchise of a water company organized under the act of 1873, it was held, that the refusal to make an award based upon the exclusive right of the company to furnish water was proper. *Matter of City of Brooklyn*, 143 N. Y. 596, 62 St. Rep. 809, affirming 73 Hun, 499, 56 St. Rep. 232, 26 Supp. 198. To authorize an award based on the use of land for a particular purpose, it must appear that it was marketable for that purpose or has an intrinsic value. *Daly v. Smith*, 18 App. Div. 194, 45 Supp. 785.

Although the majority of the commissioners must sign the report, they need not all be together at the signing, as it involves no deliberation or judicial action. *Rochester, etc., R. R. Co. v. Beckwith*, 10 How. 168. The testimony taken on the hearing

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and annexed to the report is to be considered a part thereof. *Rondout & O. R. R. Co. v. Deyo*, 5 Lans. 298. Errors occurring in the report of testimony taken before the commissioners appointed to assess damages under the General Railroad Act are subject to correction by such commissioners, as a proper judicial function, and within their province only. *N. Y., W. S., etc., R. R. Co. v. Judson*, 33 Hun, 293. In case commissioners to assess damages to lands taken for highway purposes have filed their report, their power of amendment is gone, and a subsequent report has no validity. *People ex rel. Mann v. Mott*, 60 N. Y. 649. Upon application and order of the court, the commissioners may amend or correct their report so as to conform it to the state of facts as they exist. They have no right, however, at the time of such correction, to hear proof by claimants as to damages. After having viewed the premises, and decided upon the amount of damages to be paid, their powers, under the appointment, are exhausted, so far as the amount of damages are concerned, without further order of the court. *N. Y. & Erie R. R. Co. v. Corey*, 5 How. 177. Where there has been a succession of appraisals in the same county, one report may embrace all the different parcels. *Troy & Rutland R. R. Co. v. Cleveland*, 6 How. 238.

On condemnation proceedings against land held by life tenants with remainder over to the children of one of them, *held*, error to adjudge the ownership of the principal of the award to the child of such life tenant as representing the remainder, since other children may be born, but that the money should be paid into court under § 3378. *Pecksport Con. Ry. Co. v. West*, 47 Supp. 230, modifying and affirming 45 Supp. 644.

An award should not be directed to be paid to the attorneys for the owners, unless there is a power of attorney acknowledged so as to entitle it to be recorded. *Matter of Mayor of N. Y.*, 20 App. Div. 404, 46 Supp. 832. Where land was owned by a lunatic and his wife as tenants by the entirety, the committee of the lunatic is not entitled to any part of the award, but it should be deposited in court and retained until the death of either tenant and then paid to the survivor, the income in the meantime to be divided equally between the wife and the committee. *Matter of Bd. of St. Opening*, 89 Hun, 525, 35 Supp. 409, 69 St. Rep. 795. Where a mortgage given after the passage of the act authorizing condemnation of land for street purposes expressly excludes the land

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so taken and restricts the conveyances to the portions of the lot not taken; no intention to assign, where it is made after the lands taken, can be gathered therefrom. The contrary is true where the mortgage was given prior to the passage of the act. *Kuhlman v. City of Brooklyn*, 6 Misc. 429, 27 Supp. 126, 58 St. Rep. 584; *Burkhard v. City of Brooklyn*, 6 Misc. 431, 26 Supp. 1112, 58 St. Rep. 302. See, also, as to who is entitled to the award as between mortgagor and mortgagee. *Delapp v. City of Brooklyn*, 144 N. Y. 265, 63 St. Rep. 107, affirming 3 Misc. 22, 51 St. Rep. 128, 22 Supp. 179; also, *Englehardt v. City of Brooklyn*, 44 St. Rep. 474, 19 Supp. 173.

As to when the grantee in a deed takes the award, see *Magee v. City Brooklyn*, 140 N. Y. 265, 63 St. Rep. 107, affirming 3 Misc. 620, 51 St. Rep. 433, 22 Supp. 1136. And as to what operates as an assignment of the award under like circumstances, *Sims v. City Brooklyn*, 87 Hun, 35, 33 Supp. 859, 67 St. Rep. 611.

Under what circumstances an award paid over may be considered to be in court for claims by contestants, see *Matter of City of Rochester*, 136 N. Y. 83, 49 St. Rep. 86. The right to an award vests in the owners of the land at the time of the confirmation of the report. *Matter of Pierce*, 10 Supp. 31, 24 Abb. N. C. 134. And the owner acquires no vested right in such an award until the final confirmation of the report. *Snyder v. Rochester*, 90 Hun, 171, 35 Supp. 786, 70 St. Rep. 290, reversing 8 Misc. 652, 29 Supp. 1005, 61 St. Rep. 63. An auxiliary guardian is not entitled to an award for property of an infant, but it will be refused during the infant's minority, and the income paid to the guardian. *Matter of Estate of Sproat v. Dept. Public Works*, 89 Hun, 529, 35 Supp. 332, 69 St. Rep. 743.

Interest on the award runs only from the date of the filing of the final order. *Trustees of N. Y. & Brooklyn Bridge Co. v. 3d M. E. Church*, 45 St. Rep. 615, 18 Supp. 257.

But where a time is fixed in which an award is made payable by statute, interest on it is to be computed from such time, unless the owner remains in possession. *Supers. of Eric v. City of Buffalo*, 63 Hun, 565, 45 St. Rep. 365, 18 Supp. 635. And where such owner has been left in possession, interest will not run on the award until payment has been demanded, or action taken by mandamus or otherwise to fix the liability of the city. *Donnelly v. City of Brooklyn*, 121 N. Y. 9, 30 St. Rep. 501, affirming 26 St.

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Rep. 27, 7 Supp. 49. Where the owner of the property, however, neglects, after confirmation, to satisfy mortgages and convey her property, she cannot maintain an action for interest on the award. *Devlin v. Mayor*, 60 Hun, 68, 37 St. Rep. 951, 14 Supp. 251.

Where the order of confirmation is opened as a favor to the property owner, who stipulates to claim only the value of the land as of the value when the original assessment was made, he is estopped from claiming interest on the award made on the rehearing. *Matter of 181st St.*, 44 St. Rep. 534, 18 Supp. 264. Interest may not be allowed unless by virtue of some contract express or implied, or by some statute, or on account of default of the party, when it is allowed as damages for the default. There can be no default until the final order of confirmation is made, unless the plaintiff cannot pay the award, and cannot take possession of the land until that time. The land owner should not have possession of his land and at the same time receive interest on its value. He can only obtain interest on the award by entering and docketing a judgment as provided in the condemnation law and then he can collect interest on its judgment.

Where the plaintiff abandons the condemnation proceedings after an award, interest upon an award as such can only be allowed if he afterwards renews it. *Matter of Trustees of N. Y. & B. Bridge Co.*, 137 N. Y. 95.

In a proceeding by a city to acquire the fee to land in a street, where there has been no dedication of such land, but the abutting owners have by conveyances created private easements therein, the owners are entitled to substantial damages, measured by the value of the fee subject to such easements. *Matter of 94th Street*, 22 Misc. 32, 49 Supp. 600, 83 St. Rep. 600. Where the statute authorizes the taking of certain pieces of land, or so much thereof as the commissioners may deem advisable, the owner of the land described in the act, who, in the interval between its passage and the final determination of the commissioners as to the land to be taken, has in good faith erected a building thereon, is entitled to recover compensation for such building as of the time when it was decided by the commissioners that the land should be taken. *Matter of Mayor*, 24 App. Div. 7, 49 Supp. 119, 83 St. Rep. 119.

Where different parties are interested in different parcels, a single award for the whole is improper. *Matter of Daly*, 23 App. Div.

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232, 48 Supp. 731, 82 St. Rep. 731. Under § 12 of the Grade Crossing Act, an injury to property by change of grade of a street may be the subject of an award to the owners or persons interested, although the property is not actually taken. *Matter of Grade Crossing Commrs.*, 154 N. Y. 550, 49 N. E. Rep. 127, affirming 17 App. Div. 54, 44 Supp. 844, 78 St. Rep. 844.

The owner of the fee of land subject to an easement and the owner of the easement are together the "owners" of the land. *Matter of Bd. of Street Opening*, 27 App. Div. 265; *sub nom. Matter of Decatur Ave.*, 50 Supp. 621, 84 St. Rep. 621. An award to unknown owners, made in condemnation proceedings for property taken by the city of New York, to open a street, does not constitute an adjudication that a person owning an easement, to which the land was subject, is not entitled to any part of the award. *Matter of Bd. of Street Opening*, 27 App. Div. 265, *sub nom. Matter of Decatur Ave.*, 50 Supp. 621, 84 St. Rep. 621.

The report of the commissioners should not be sent back to them for further particulars unless it appears that there is probable cause to believe that they have made a material error which neither their minutes nor report discloses. *Bd. of Water Commrs. of Philmont v. Shutts*, 25 App. Div. 22, 49 Supp. 319, 83 St. Rep. 319. The mere fact that parties are dissatisfied with the amount of the awards is not sufficient to justify a return of the report for an itemized statement thereof. *Bd. Water Commrs. of Philmont v. Shutts*, 25 App. Div. 22, 49 Supp. 319, 83 St. Rep. 319. A decision made in condemnation proceedings as to the validity of taxes as liens is conclusive upon the parties. *Cottle v. N. Y. & W. S. & B. R. R. Co.*, 27 App. Div. 604, 50 Supp. 1008, 84 St. Rep. 1008.

Where an absolute title in fee is taken in proceedings instituted by a municipal corporation for its condemnation for park purposes, the owner is entitled to an award for the injury which will be done to other and abutting land owned by him, which is drained by a system of drains having their outlet through a trunk sewer in the land sought to be taken, because the right to maintain such outlet for the drains is taken away. *Matter of City of Rochester*, 24 App. Div. 383, *sub nom. Baker v. City of Rochester*, 48 Supp. 764, 82 St. Rep. 764. The transfer of lands under an agreement, secured by a mortgage on the premises by the grantee, to pay the amount of an award made for the land in condemnation proceedings, confers the right on a subsequent

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grantee of the original grantors to a proportionate part of the award and the right to maintain an action against the city making the same. *Youngs v. Stoddard*, 27 App. Div. 162, 50 Supp. 475, 84 St. Rep. 475.

An action to recover an award made in condemnation proceedings is one upon contract, in which the defendant may set up a counterclaim for damages for breach of a prior contract for the sale of the land at an agreed price. *Cottle v. N. Y. & W. S. & B. R. R. Co.*, 27 App. Div. 604, 50 Supp. 1008, 84 St. Rep. 1008. An action against the city of Binghamton to recover the amount of an award in street opening proceedings which is commenced on the day on which a resolution directing payment of the award into court on account of adverse claims is signed by the mayor and the day before the payment into court is made is improperly brought, as there is no necessity therefor. *Patterson v. City of Binghamton*, 154 N. Y. 391, 48 N. E. Rep. 739, affirming 4 App. Div. 615, 39 Supp. 408.

Where a portion of leased land is taken for a public improvement, the apportionment of rent provided for in § 982 of the Consolidation Act relates merely to the ascertainment of the rent to be paid for the part not taken, and does not deprive the lessees of the right to recover damages sustained by reason of special losses arising from the destruction of the term as to the part taken. *Matter of Daly*, 20 App. Div. 286, 51 Supp. 576, 85 St. Rep. 576. Where a portion of leased land is taken for a public improvement the lessees are not entitled to everything in the way of damage that they sustain, but a fair and equitable adjustment of the award is to be made between them and the lessor, based on all the facts connected with the situation of the property, its uses and value. *Matter of Daly*, 29 App. Div. 286, 51 Supp. 576, 85 St. Rep. 576.

An owner of perpetual easements of light, air, and access to land, where the servient land has been condemned by the city of New York for the purpose of its board of education, is entitled to the award for the easements thus appropriated by the city, without any deduction therefrom for taxes and assessments existing against the land to which the easements appertain. Sup. Ct. 1898; *Baker v. Mayor*, 31 App. Div. 112, 52 N. Y. Supp. 533, 86 St. Rep. 533.

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Report of Commissioners.

SUPREME COURT.

In the Matter of the Assessment of the Damages sustained by George Clark, by reason of the taking of his lands, etc., by the Water Commissioners of Amsterdam.

148 N. Y. 1.

To the Supreme Court of the State of New York:

The undersigned, William Green, Thomas G. Foster, and James T. Bradford, commissioners of assessment in these proceedings, appointed by order of this court at a Special Term thereof, held in the village of Saratoga Springs, on the 5th day of April, 1892, Hon. John R. Putnam, a justice of this court, presiding, and thereafter entered in the county clerk's office of Fulton County, to determine the damages sustained by the said George Clark, by reason of the taking of his lands, tenements, and hereditaments, rights, or property by the said water commissioners of Amsterdam, for the purposes of the act of the legislature of the State of New York, entitled "An act to provide for the supply of water in the village of Amsterdam," and to exempt the said village from the provisions of chapter 181 of the Laws of 1875, being chapter 101 of the Laws of 1881, and the acts amendatory thereof and supplemental thereto, and to determine the sum which shall be a just compensation to the said George Clark, petitioner, for the appropriation for the purposes of the said act of any property, rights, or privileges belonging to him that may be required for the purposes of said act, or for the title to or use of any such property, do respectfully report :

That after our appointment, and before entering upon our duties as such commissioners, we severally subscribed, took, and filed the oath required by law, and that we all met together in the performance of our duties, and personally examined the land and other property hereinbefore described, taken, used, and required by the said water commissioners for the purposes of the aforesaid act, to wit : (insert description of property taken.) Also the easement and right to the following described land, to allow therein a pipe line for conducting water to the said city of Amsterdam for the purposes of said act, and the right to enter upon said land at any and all times for the purposes of relaying, repairing, and maintaining the pipe line aforesaid to wit : (insert description.)

And we have estimated, and do now estimate, and report to this court, that the damages sustained by said George Clark in consequence of and directly resulting from the appropriation to the purposes of the aforesaid act of the property, rights, and privileges above described, are as follows :

From property of the fee of 11-100 acres of land.....	\$ 50.00
From taking easement for pipe lines and timber cut.....	80.00
From depreciation in value of said Clark's remaining lands, caused by diversion of water and by other incidental injuries.....	2,000.00
Total original damages.....	\$2,130.00

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And we do further report that said appropriation was made in the year 1882, but that from that date to the present time the said water commissioners have left an orifice of 1 1-2 inches in diameter near the bottom of the dam erected by them upon the lands appropriated as aforesaid, and have permitted the water to flow freely from the said orifice and into the natural bed of said stream at all times ; and that the said George Clark, with the permission of the said water commissioners, has conducted water from a point above said dam to his buildings in a lead pipe 1 1-4 inches in diameter.

If the perpetual continuance of said orifice and lead pipe could be guaranteed, the one-third part of the above third item of damage would be \$1,463.33 instead of \$2,000 ; but as we hold that no effective guarantee to that effect can be given, and that said water commissioners may discontinue said orifice and lead pipe line, and as we further hold that said George Clark will be precluded by this proceeding from any further claim, we report that he is entitled to the amount of damages above stated.

The proper basis upon which interest should be computed is, however, the amount of the damage actually sustained, to wit : the sum of \$1,463.33, the interest upon such sum for ten years, from 1882 to 1892, is \$877.99.

We do, therefore, determine and report that the sum of \$3,007.99 is and will be a just compensation to the said George Clark for the said appropriation.

And we do further report that we were attended on our personal examinations of the aforesaid property by the counsel for said George Clark and for the said water commissioners, and that we examined witness upon hearings before us, being also attended upon said examinations by said counsel, and that all the evidence so taken accompanies this report.

We certify that our fees and expenses are as follows :

Fees of three commissioners, four days at \$5 per day each.	\$ 60.00
Expenses, including stenographer's fees and hotel bills, railroad fare, etc.....	80.71

Total fees and expenses.....	\$140.71
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All of which is respectfully submitted this 15th day of November, 1892.

WILLIAM GREEN,
JAMES T. BRADFORD,
THOMAS G. FOSTER,
Commissioners of Assessment.

ARTICLE VII.

FINAL ORDER AND COSTS THEREON. §§ 3371, 3372, 3373.

SUB. 1. FINAL ORDER, HOW OBTAINED AND CONTENTS. § 3371.

2. COSTS ON FINAL ORDER. § 3372.

3. EFFECT OF FINAL ORDER AND HOW ENFORCED. § 3373.

SUB. 1. FINAL ORDER, HOW OBTAINED AND CONTENTS. § 3371.

§ 3371. Confirmation or setting aside report; deposit when payable.

Upon filing the report of the commissioners, any party may move for its confirmation at a Special Term, held in the district where the property or some part of it is situated, upon notice to the other parties who have appeared, and upon such motion, the court may confirm the report, or may set it aside for irregularity, or for error of law in the proceedings before the commissioners, or upon the ground that the award is excessive or insufficient. If the report is set aside, the court may direct a rehearing before the same commissioners, or may appoint new commissioners for that purpose, and the proceedings upon such rehearing shall be conducted in the manner prescribed for the original hearing, and the same proceedings shall be had for the confirmation of the second report, as are herein prescribed for the confirmation of the first report. If the report is confirmed, the court shall enter a final order in the proceeding, directing that compensation shall be made to the owners of the property, pursuant to the determination of the commissioners, and that upon payment of such compensation, the plaintiff shall be entitled to enter into the possession of the property condemned, and take and hold it for the public use specified in the judgment. Deposit of the money to the credit of, or payable to the order of, the owner, pursuant to the direction of the court, shall be deemed a payment within the provisions of this title.

An order of confirmation of the report of commissioners in a street opening proceeding is in the nature of a judgment, and cannot be attacked collaterally on non-jurisdictional grounds. *Pro. ex rel. Dady v. Suprs.*, 154 N. Y. 381, 48 N. E. Rep. 813.

Where a property owner dies after receiving notice of motion to confirm the report of the commissioners and failure to appear at the hearing which was adjourned, his executors are not entitled to notice or to be made parties to the proceedings. *Matter of Lexington Avenue*, 44 St. Rep. 588, 17 Supp. 873.

The court has power in the proper case to grant leave to a party interested, to file objections to the report of the commissioners, after the time fixed by them in their notice has expired. *Matter of 163d Street*, 61 Hun, 365, 40 St. Rep. 684.

The principles upon which compensation is to be made to the owner of lands taken under the General Railroad Law, have been frequently considered by the courts of this State, and the rule is

Art. 7. Final Order and Costs Thereon.

now established that such owner is to receive as compensation, first, the full value of the land taken, and second, where a part only of land is taken a fair and adequate compensation for all injury to the residue, sustained and to be sustained by the construction and operation of the railroad. The first element in the award is compensation for land which the railroad takes, and to which it acquires title, and second, damages which are the result or consequences of the construction of the road upon property not taken, and which the owner still retains. Such damages are generally consequential, and to ascertain them necessarily involves an inquiry into the effect of the road upon the property, and a consideration of all the advantages and disadvantages resulting and to result therefrom. *Newman v. Elev. Rd. Co.*, 118 N. Y. 618, citing numerous authorities, including *Lewis on Eminent Domain*, § 471. While this case was decided under the provisions of the General Railroad Act, a comparison of its provisions, as quoted in the opinion, with the provisions of § 3370 will show that they are in this respect substantially similar.

It is said, *Bohm v. Elev. Rd. Co.*, 129 N. Y. 585, that generally, in taking property in condemnation proceedings, the rule may be said to be, the value of the land taken at its market price, and no deduction can be made from that value for any purpose whatever; that as to the remaining land, the question is: Whether the company should pay for the injury caused by the taking of the other property? or, whether, in case the proposed use of the property taken would depreciate the value of that which was not taken? or, whether such proposed use could be regarded and the depreciation arising therefrom be awarded as part of the consequential damages separate from the taking? The court held the latter to be the true rule.

In *Papenheim v. Mct. Elev. Rd. Co.*, 128 N. Y. 436, it is said that it seems that the measure of damages can be the difference between the fair market value of the property at the time of condemnation without the structure, and the present market value of the property with the structure in existence.

Again, in *Odell v. N. Y. Elev. Rd. Co.*, 130 N. Y. 690, 42 St. Rep. 591, it is held that the full market value must be paid without deduction for benefits, considering the question as to damages to lands not taken, and of the property rights of abutting owners, and advantages and disadvantages, benefits and injuries

Art. 7. Final Order and Costs Thereon.

of the road must be considered, and if the benefits equal or exceed the injuries no damages can be awarded.

In *Sutro v. Manhattan Ry. Co.*, 137 N. Y. 592, it is held that in estimating damages to owners abutting on a side street by reason of the construction and operation of the elevated railroad, all benefits, general or special, to the rental value of the property resulting from the existence of the railway are to be considered, and only damages as are over and above such benefits are recoverable.

In taking land for a street opening, the measure of damages to building property which is taken is the difference between the value of the building before the taking and the value of the remaining portions after the street is opened, and in making awards for lands, the benefits should be assessed on the land benefited, and not considered with reference to the land taken. *In re Lexington Av.*, 17 Supp. 872, 44 St. Rep. 550.

It seems that where land is taken by a city, or by one of its political divisions, the benefit may be set off not only against the damages against the remainder, but also against the value of the property taken. *Eldridge v. City of Binghamton*, 120 N. Y. 309, citing numerous authorities. And it is said reversion of the land is never contemplated in the assessment of damages for lands taken by a corporation; it is regarded as permanent and the damages are awarded on that basis. *Minor v. N. Y. C. & H. R. R. Co.*, 123 N. Y. 342, affirming 46 Hun, 612. The report of commissioners will not be set aside except for error of law or for fraud or imposition, showing bias, prejudice, misconduct, or want of judgment. *Matter of Chapin*, 84 Hun, 490, 32 Supp. 361, 65 St. Rep. 559.

When the report discloses no erroneous methods of procedure, nor any erroneous principle adopted by commissioners to appraise damages, it is the duty of the appellate court to affirm the proceeding. *Matter of Buffalo & Geneva Rd. Co.*, 37 St. Rep. 343, 14 Supp. 1, citing *Matter of N. Y. Elev. Rd. Co.*, 12 Supp. 858, 35 St. Rep. 944. Since commissioners can gain more information from an inspection of the premises than from evidence, their finding will not be disturbed unless it is clearly apparent that injustice has been done. The report will not be set aside for technical errors in the admission of evidence, where no wrong principle has been adopted and the damages are not excessive.

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Matter N. Y. Elev. Rd. Co., 40 St. Rep. 647, 15 Supp. 909; *Matter of Thompson*, 85 Hun, 438, 32 Supp. 897, 66 St. Rep. 226; *Matter of City of Rochester*, 48 St. Rep. 358, 20 Supp. 506.

This is the rule even though the court on the examination of the evidence as it appears in the record might be of the opinion that the award is larger than it should have been. *Matter of N. Y. Elev. Rd. Co.*, 35 St. Rep. 947, 12 Supp. 857. The title to land proposed to be taken, as between the public and the individual, cannot be decided on the application to confirm the commissioner's report. *Matter of City of Yonkers*, 117 N. Y. 564, 28 St. Rep. 676; *Matter of Wells Av.*, 22 St. Rep. 648, 4 Supp. 301. The Special Term may send back a report to commissioners to consider and pass upon the account of benefit, where no allowance or deduction therefor has been made in appraising the damages to respondent's land. *Matter of Kings Co. Elev. R. R. Co.*, 35 St. Rep. 367, 12 Supp. 198.

The court may modify an order where no award was made to an owner of land taken, who failed to appear before the commissioners. *Matter of 181st St.*, 35 St. Rep. 548, 12 Supp. 345. A report may be sent back for an apportionment of the award between joint owners after it has been confirmed. *Matter of Chapin*, 89 Hun, 603, 34 Supp. 1058, 69 St. Rep. 30. The report of commissioners appointed to fix the compensation to be paid owners will not be set aside although they disregarded the testimony of witnesses and formed their judgment by personal inspection. *Matter of Kings County*, 39 St. Rep. 876, 15 Supp. 516.

An award will not be set aside for inadequacy, unless it appeared that the commissioners proceeded on an erroneous principle. *Matter of Newton*, 45 St. Rep. 18, 19 Supp. 573; *Matter of Brooklyn Elev. Rd. Co.*, 87 Hun, 88, 33 Supp. 881, 67 St. Rep. 497. Where the estimates of witness are based on elements largely speculative, an award of a smaller sum than the average of the estimates will not be disturbed. *R. & H. V. Rd. Co. v. Myers*, 43 St. Rep. 734, 17 Supp. 311.

Courts will not set aside an award unless the compensation is too great, and unless the excess is plain and appealable. *Pecksport Con. Ry. Co. v. West*, 79 St. Rep. 644, 45 Supp. 644, modified and affirmed, 47 Supp. 230. The second award under a new appraisal will not be disturbed, when there is no legal error or irregularity, and the damages are neither grossly excessive nor

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insufficient. *Southern Boulevard Rd. Co.*, 49 St. Rep. 732, 20 Supp. 769.

An award will not be set aside for inadequacy or because excessive, nor for mere errors in the receipt or exclusion of evidence, to justify the reversal for error of law; it must be made to appear that the commissioners adopted an erroneous principle in estimating the compensation. *Matter of Daley v. Smith*, 18 App. Div. 194, citing *Matter of South Seventh Street*, 48 Barb. 16; *Matter of Gilroy*, 78 Hun, 260.

No error of law committed by the commissioners on their decision upon the merits, or in their admission or rejection of evidence, can be reviewed or examined on application to confirm the report; such review can only be had on appeal. *Rochester, etc., R. R. Co. v. Beckwith*, 10 How. 168. Where the commissioners have been regular in their proceedings, and due notice of the motion for confirmation has been given, it is a matter of course to confirm their report. *N. Y. & E. R. R. Co. v. Corey*, 5 How. 177; *Albany & Northern R. R. Co. v. Cramer*, 7 id. 164. The report, if conformable to the provisions of the act, is to be confirmed. *N. Y. & Erie R. R. Co. v. Coburn*, 6 How. 224. The court cannot consider any of the objections or exceptions, except that which stated that neither the report or any of the proceedings which preceded it properly designated the lands proposed to be taken. All the other objections and exceptions must be considered on appeal from the report after confirmation. *Matter of N. Y. & Jamiaca R. R.*, 21 How. 434. Although a court has power, upon proper cause shown, to deny a motion to confirm the commissioners' report, it is not sufficient cause to show that the commissioners erred as to the *quantum* of compensation awarded. *Matter of Prospect Park, etc., R. R. Co.*, 13 Hun, 345; same case on re-argument, 16 id. 261. A report may be set aside where the land owner declined to present evidence before the commissioners on account of erroneous information as to his legal rights. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 63 How. 265. The court at Special Term has power to vacate its former order confirming the commissioners' report, and to set it aside for carelessness or irregularity amounting to injurious misconduct, or for palpable mistake or accident. The exercise of this discretion is reviewable at General Term, but not in Court of Appeals. The Special Term may further proceed to revoke

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the appointment of the commissioners and appoint new ones. This power is inherent in the court, and not dependent on the statute. *Matter of N. Y. Central, etc., R. R. Co.*, 64 N. Y. 60; dismissing appeal from 5 Hun, 105. To same effect as to appeal to Court of Appeals, *Matter of Prospect Park & C. I. R. R. Co.*, 85 N. Y. 489.

The report may be set aside where it appears that the commissioners had talked privately with a person from whom they obtained information discrediting claimant's testimony, and the award to him was greatly inadequate, and that his neglect to oppose the confirmation of the report arose from neglect or misconduct of his attorney. *Matter of N. Y. Central R. R. Co.*, 5 Hun, 105; *Visscher v. Hudson River R. R. Co.*, 15 Barb. 37. It is said that the court cannot suspend or correct the action of the commissioners nor set aside the proceedings, except when specially authorized by statute. Where commissioners took evidence, aside from that which was held on appeal to be a proper basis of decision, *held*, that as it did not appear that they intended any disrespect to the court, or arbitrarily to disregard its opinion, it was not such misconduct as would justify vacating the order appointing them. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 2 State Rep. 456. Where the report of commissioners appointed to appraise the damages to be awarded to an abutting owner for injuries to his easement or other interest in that portion of the street occupied by an elevated railway did not set forth the particulars of the damages, as required by the court, it was held, on motion to set the report aside, that there was no such irregularity as required such action, but that the report should be confirmed, and then all questions, both of law and fact, that could in any form be reviewed on an appeal from an order confirming the report, could be reviewed by the appellate court. *Matter of N. Y. Elevated R. R. Co.*, 35 Hun, 414. The report cannot be set aside on motion because of an error committed by the commissioners in excluding or admitting testimony to which one of the parties objected, nor because of any ordinary ruling in the progress of the trial to which an objecting party must reserve his right of review by an exception. So held as to second hearing. *Matter of N. Y. Elevated R. R. Co.*, 41 Hun, 502. But the right to make a motion to set aside the second report is distinctly recognized and announced in several cases. *Id.*

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While it is true that courts will guard against improper influence and will require the avoidance of the very appearance of evil, yet no rule has yet been established which makes it necessary or proper for the court to set aside the report of commissioners simply because they have charged or received a fair and adequate compensation for the time they have given to their duties, and the services they have performed. So held where there was no agreement in advance as to fees, and after the report the commissioners were paid more than legal fees. *Matter of Staten Island Rapid Transit Co.*, 41 Hun, 393. The default of an owner upon the hearing before commissioners may be excused by the Supreme Court on motion to confirm the report, and the report set aside and a new hearing directed. *Matter of N. Y. & Lackawanna R. R.*, 93 N. Y. 385.

The provisions of § 3378 do not violate the Constitution; the money takes the place of land and is subject to the same liens to which the land was before being taken. *Matter of N. Y. C. & H. R. R. Co.*, 60 N. Y. 116. Where the real claimants cannot be determined a substantial award should be made to unknown owners; a nominal award ought not to be made to a claimant who is a doubtful owner. *In re Department of Public Parks*, 53 Hun, 280, 6 Supp. 750, 25 St. Rep. 9. Where the owner of land agreed to pay an attorney for his services a certain share of the award, such share to be a lien on the property, it was held that this did not render it a charge on the land in the hands of defendant. *Grigg v. McNulty*, 5 Misc. 334, 25 Supp. 504, 55 St. Rep. 210.

A claim by a county for unpaid taxes upon a portion of the award must be established by sufficient evidence to uphold the tax title. *Matter of N. Y. C. & H. R. R. Co.*, 90 N. Y. 342. An award made by commissioners will not be set aside for inadequacy, or as excessive, unless it is palpably wrong in that respect. *Matter of Brooklyn Elevated Railroad Co.*, 87 Hun, 88. In considering the proceedings of the commissioners, every intendment is in favor of their action, which is not determined solely by the evidence, as they may view the premises to assist them in reaching a conclusion. A report may be set aside at Special Term for irregularity, error of law, and because of an excessive or insufficient award. Where the award is set aside by the Special Term, the appellate division has an inherent power

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to review the order. On such an appeal from a final order, the appellate division may direct a new appraisal, which, in that instance only, shall be final and conclusive. *Manhattan Railway Co. v. O'Sullivan*, 6 App. Div. 571.

Under a statute where the General Term appointed the commissioners, and confirmation was had before it, the Court of Appeals held that the General Term had not a mere formal function, and could supervise the whole proceeding, and is so far a tribunal of original jurisdiction. *Matter of Kings County Elevated Railway Co.*, 82 N. Y. 102. Where a railroad corporation makes application to acquire title to uplands on the bank of a river, it is no objection, on appeal from order confirming report of commissioners awarding damages, that the company proposed to build an embankment in front of the owner's premises, cutting his pier off from the river; if his rights have been interfered with, his remedy is by action, not by appeal. *In re N. Y., W. S. & B. R. R. Co.*, 101 N. Y. 685. The proceeding may be discontinued at any time before confirmation; up to that time there is no obligation to take the land imposed upon the company. *Matter of Syracuse, etc., R. R. Co.*, 4 Hun, 311; *Hudson River R. R. Co. v. Outwater*, 3 Sandf. 689. After confirmation the corporation cannot, without leave of the court, abandon the proceedings and refuse to pay the award made to the owner upon confirmation of the report, mutual rights have vested in the parties, and the corporation cannot of its own option recede. It is not necessary in order to conclude the corporation that the title to the land should have vested in it under the proceedings, it is sufficient if the right to acquire it in payment of the award is fixed. Where the railroad company is required to file the papers after an award on motion, they were ordered so to do. *Matter of Rhinebeck & Conn. R. R. Co.*, 67 N. Y. 242. See, however, provisions of next section as to this point. Where proceedings are sought to be discontinued after report and before confirmation, it is within the legitimate power of the court in granting the application to annex such terms to go with the favor as justice and fairness require, and the court is not restricted to costs and disbursements as a condition, but may in its discretion impose payment of an allowance. *N. Y., W. S. & B. R. R. Co. v. Thorne*, 1 How. (N. S.) 190. Upon the application to confirm a report, a commissioner who has signed such

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report will not be allowed to stultify himself by an affidavit that he signed it without reading it or hearing it read. *Rochester & Genesee, etc., R. R. Co. v. Beckwith*, 10 How. 168. The court must act solely on the report of the commissioners, and affidavits cannot be used to impeach or contradict it. The report must show that an error has been committed, or that injustice has been done, to enable the court to reverse or set aside the proceedings. *Rondout & Oswego R. R. Co. v. Field*, 38 How. 187. Where the parties have agreed as to the principles on which the appraisal is to be conducted, the court cannot interfere. *In re N. Y., Lackawanna & Western R. R. Co.*, 102 N. Y. 704.

The report may be amended by the commissioners to conform to the facts, by order of the court before it is filed; but they cannot hear proofs upon such correction. *N. Y. & Erie R. R. Co. v. Corey*, 5 How. Pr. 177; *People ex rel. Mann v. Mott*, 60 N. Y. 649. Errors in the minutes of testimony attached to the report may be corrected by the commissioners, but an error in the admission of facts is not cured by the certificate of a member of the commission that the report was not affected by such evidence. *Matter of N. Y., W. S. & Buffalo R. Co.*, 33 Hun, 293.

In *Re N. Y., L. & W. R. R. Co.*, 29 Hun, 1, it is said that the commissioner who has signed a report will not be allowed to stultify himself by an affidavit when he signed it without reading it or hearing it read. *Rochester & Genesee Valley R. R. Co. v. Beckwith*, 10 How. Pr. 168. The fact that the wife of a commissioner is the cousin of a stockholder does not vitiate the appraisal. *Matter of the Albany Northern R. R. Co. v. Cramer*, 7 How. Pr. 164.

Commissioners of appraisal appointed in proceedings to condemn land for the purposes of a railroad company are not disqualified by the fact that they were formerly owners of stock, and incorporators of the predecessor of the company bringing the proceeding, where they no longer hold any stock and have no interest in the company. *Matter of Brooklyn Elev. R. R. Co.*, 32 App. Div. 321, 52 Supp. 997, 86 St. Rep. 997.

Where after the report had been made it was served when one of the commissioners was not a freeholder, it was held, in the absence of any allegation of improper conduct on his part, not to warrant setting aside report on motion by one of the parties who had consented to his appointment. *Matter of*

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Application of N. Y., W. S. & Buffalo R. Co., 35 Hun, 575, cited, *Matter of McLean*, 138 N. Y. 163.

The fact that one of the commissioners was not a freeholder at the time of the application, but became such before he was actually appointed, does not affect the validity of the appraisal; but where the son of one of the commissioners was appointed as station agent of the petitioner's road, pending the proceeding, it was held sufficient ground to set aside the appraisement. *N. Y., W. S. & Buffalo R. Co. v. Townsend*, 36 Hun, 630. The fact that a person has been a city appointee, and is at times employed by the city, or was interested in the passage of the act appointing commission, does not disqualify him from acting as commissioner in proceeding by the city to acquire land. *Matter of Mayor*, 20 Misc. 520, 46 Supp. 640, distinguishing *People ex rel. Edwards v. Potter*, 36 Hun, 181; *Matter of Terminal Railway*, 16 App. Div. 516, citing *People ex rel. Downey v. Daines*, 38 Hun, 43, *Buckley v. Drake*, 41 Hun, 384.

The office of commissioners of appraisal is a public trust within the meaning of the constitution, and the election of such commissioner to the office of justice of the Supreme Court disqualifies him from acting as commissioner. *Matter of Gilroy*, 11 App. Div. 65, 42 Supp. 640, 76 St. Rep. 640. The award of drainage commissioners is not affected by the fact that one of the petitioners paid the commissioners' hotel bill, since Laws 1886, chap. 636, provides that in case the necessity for the drain is established, all the expenses of the commissioners shall be a lien on the land benefited, and in case the necessity for the drain is not established, the expense shall be borne by the petitioners; therefore the petitioner gained nothing by said payment, nor was it misconduct on the part of the commissioners to take the advice of petitioner's counsel as to the necessary legal steps required of the commissioners, such as giving notice, where nothing is said as to any question of fact to be decided by them; nor is it misconduct in such case for one of the commissioners to subpoena witnesses, instead of causing it to be done by some other person. *In re Town of Penfield*, 69 Hun, 601, 23 Supp. 942, 53 St. Rep. 550.

The report may be set aside where the commissioners talked privately with a person from whom they obtained information discrediting the owner's testimony, and where the award was inadequate. *Matter of N. Y. C. & H. R. R. Co.*, 5 Hun, 105, appeal

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dismissed 64 N. Y. 60. Where, without any agreement in advance, the commissioners, after their services were completed, made out a bill and were paid more than their legal fees, it was held not ground for setting aside the report. *Matter of Staten Island Rapid Transit Company*, 41 Hun, 392.

The fact that one of the commissioners was for a time during the view of the premises away from the others will not operate to set aside the award. *Matter of N. Y., Lackawanna & Western R. R. Co.*, 63 How. 265.

Section 46 of the Code, forbidding a judge from acting where he is related to any party within the sixth degree, does not apply in a street opening, and though the statute requires that every commissioner to be appointed must be a disinterested person, the fact that one of them is the brother-in-law of a person whose interest is likely to be affected by the proceeding is not a ground for the removal of such commissioner. *Matter of Ogden Street*, 63 Hun, 188, 43 St. Rep. 422, 22 Civ. Pro. 12, 17 Supp. 744, reversing *Matter of City of Middletown*, 21 Civ. Pro. 201, which held the question of the illegality of the appointment of a commissioner cannot be raised after his report is confirmed. *Morris v. The Mayor*, 55 Hun, 476, 29 St. Rep. 376, 8 Supp. 763, reversing 7 Supp. 943, 17 Civ. Pro. 407.

The omission of the word "faithful" from the oath of the commissioners is material, and affects the proceedings unless waived, and objection on the ground of non-residence of the commissioners is not jurisdictional and may be waived. *Matter of Gilroy*, 85 Hun, 424, 32 Supp. 891, 66 St. Rep. 208.

The fact that one of the commissioners was not present at most of the hearings does not invalidate the proceedings. *Matter of Riverside Av.*, 83 Hun, 50, 31 Supp. 735, 64 St. Rep. 366.

Where proceedings were instituted to acquire lands and were resisted on the grounds that the petitioner was not incorporated for a public purpose, and so, therefore, incapable of exercising the right of eminent domain, and the objection was oral, and both parties consented to the appointment of commissioners, and an order to that effect was entered and no appeal taken, and subsequently it was decided by the Court of Appeals that the lands sought to be acquired were not for a public use, and that the petitioner had no power to acquire title by condemnation, it

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was held that the want of the power in the petitioner constituted an original jurisdictional defect to the order, and that the land owner had not waived the right to move to set aside the order appointing commissioners. *Matter of N. F. & W. R. Co.*, 121 N. Y. 319.

Notice of Motion to Confirm Report of Commissioners.

SUPREME COURT.

In the Matter of the Proceedings of George Clark for damages for the for the taking and appropriation of lands, etc.	}	148 N. Y. 1.
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To C. S. NISBET, Esq., Attorney for the Water Commissioners :

TAKE NOTICE : That at the court-house in Elizabethtown, Essex County, at a Special Term of the Supreme Court to be held on the 12th day of December, 1892, at the opening of court on that day, the petitioner, George Clark, will present to this court the report of the commissioners of assessment in this proceeding, a copy of which is hereto annexed and herewith served upon you, and upon all the papers and proceedings herein will move the court to confirm the said report and to allow the costs of this proceeding in favor of the petitioner and against the said Water Commissioners of the City of Amsterdam, and also to allow \$10 costs of this motion.

Dated Johnstown, N. Y., November 23, 1892.

Yours, etc.,

SMITH & NELLIS,

Attorneys for Petitioner.

Order Setting Aside Report of Commissioners of Appraisal and Appointing new Commissioners.

(Caption.)

In the Matter of the Application of the Manhattan Railway Company <i>et al.</i>	}	150 N. Y. 569.
<i>agst.</i>		
Christina O'Sullivan <i>et al.</i>		

The above-named plaintiffs having moved at a Special Term of this court held at chambers at the county court-house in the city of New York, on October 7th, 1895, for an order setting aside the reports of Messrs. William C. Holbrook, Rollin M. Morgan, and Edward O'Brien, as commissioners of appraisal herein, and for such other and further relief in the premises as might be just, together with the costs of the motion, and said motion having been duly ad-

Art. 7. Final Order and Costs Thereon.

journed to October 17th, 1895, and having come on to be heard at said date :

Now, upon reading and filing the said notice of motion, dated September 19th, 1895, with the admissions of due service thereof upon Messrs. Evarts, Choate & Beaman, attorneys for defendants O'Sullivan other than Christina O'Sullivan and Charles A. O'Sullivan, upon William V. Rowe, Esq., guardian *ad litem* of said Christina O'Sullivan, a lunatic, and upon Thomas T. Sherman, Esq., guardian *ad litem* of the infant defendant, Charles A. O'Sullivan, and on reading the report of said commissioners, which report and the minutes of testimony taken by them were filed in the office of the clerk of the said county of New York, on December 21st, 1894, and upon reading the plaintiffs' proposed propositions of fact and law submitted to said commissioners and referred to in their said report, being plaintiffs' exhibit No. 1, of December 15th, 1894, for identification, and made part of the report herein and returned with the aforesaid testimony, and filed in the office of the clerk on the aforesaid day, and upon all the papers made and proceedings had in the above entitled special proceeding, and after hearing Edward C. James, Esq., and William H. Godden, Esq., of counsel for plaintiffs, in support of the motion, and Joseph H. Choate, Esq., of counsel for defendants O'Sullivan other than Christina O'Sullivan and Charles A. O'Sullivan, and as counsel for said William V. Rowe, Esq., and Thomas Sherman, Esq., guardian *ad litem* as aforesaid, and no one having appeared further, and due deliberation having been had thereupon, on motion of Davies, Short & Townsend, plaintiffs' attorney, it is

Ordered, that said motion be and the same is hereby granted with \$10 costs to plaintiffs ; that the award of Messrs. William C. Holbrook, Rollin M. Morgan and Edward O'Brien as commissioners of appraisal herein, and their report filed in the office of the clerk of the city and county of New York on December 21st, 1894, be and the same are hereby vacated and set aside ; and it is further

Ordered, that Augustus G. Brown, John Delahanty, and John F. Doyle, three disinterested and competent freeholders, each a resident of the county of New York, in which county the real property involved herein is situated, be and they hereby are appointed as commissioners herein to ascertain and appraise the compensation to be made to the defendants as owners of the property described in the petition herein and taken for the public use specified in said petition ; and it is further

Ordered, that the first meeting of the said commissioners be held at 120 Broadway in the city of New York, office of August Brown, on the 20th day of December, 1895, at 11 o'clock in the forenoon of that day.

MILES BEACH,

(A copy.)

J. S. C.

HENRY D. PURROY,

Clerk.

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Order of Confirmation.

At a Special Term of this court held in the court-house in Elizabethtown, Essex County, on the 12th day of December, 1892 :

Present :—Hon. S. A. Kellogg, *Justice*.

In the Matter of the Assessment of Damages
sustained by George A. Clark, etc.

148 N. Y. 1.

The report of the commissioners of assessment appointed herein by order of this court dated April 5, 1892, having been presented, together with all the evidence taken by the said commissioners,

Now, on reading and filing the said report and evidence, and on motion of Smith & Nellis, attorneys for the said petitioner; and after hearing Charles S. Nisbet in opposition to the motion to confirm said report as attorneys for the water commissioners herein, it is

Ordered, that the said report and award of said commissioners be amended and modified so that the sum of \$666.66 be deducted from the amount of said award; and the award so modified, to wit, in the sum of \$2,341.33, be confirmed. The said sum of \$666.66 being deducted from the award of said commissioners as the value fixed by them upon water which in fact has not been taken or appropriated by the plaintiffs, to wit, the water running through the orifice in lower portion of its dam, 1½ inches in diameter, and the water running through the pipe to the barns of the petitioner.

It is further ordered, that said commissioners of assessment be paid the sum stated in their report for fees and expenses, namely, \$20 each for fees, and the expenses in the sum \$80.71. That the foregoing award for damages, together with the said fees and expenses, be paid by said water commissioners as provided by the water act by virtue of which these proceedings are had; and the said award so made and confirmed with interest thereon from this date shall be a liability against the city of Amsterdam as by said act provided. It is further

Ordered, that neither party recover costs of the other herein, except as hereinbefore directed, and except as is specially provided by the said Water Act.

Let this order be entered in Fulton County.

S. A. KELLOGG,
J. S. C.

SUB. 2. COSTS ON FINAL ORDER.

§ 3372. Offer to purchase; costs; additional allowance.

In all cases where the owner is a resident and not under legal disability to convey title to real property, the plaintiff, before service of his petition and notice, may make a written offer to purchase the property at a specified price, which must within ten days thereafter be filed in the office of the clerk of the county where the property is situated, and which cannot be given in evidence before the commissioners or considered by them. The owner may at the time of the presentation of the petition, or at any time previously, serve notice in writing of the acceptance of plaintiff's offer, and thereupon the plaintiff may, upon filing the petition, with proof of the making of the offer and its acceptance, enter an order that upon payment of the compensation

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agreed upon, he may enter into possession of the real property described in the petition and take and hold it for the public use therein specified. If the offer is not accepted, and the compensation awarded by the commissioners does not exceed the amount of the offer, with interest from the time it was made, no costs shall be allowed to either party. If the compensation awarded shall exceed the amount of the offer, with interest from the time it was made, or if no offer was made, the court shall, in the final order, direct that the defendant recover of the plaintiff the costs of the proceeding, to be taxed by the clerk at the same rate as is allowed, of course, to the defendant when he is the prevailing party in an action in the Supreme Court, including the allowances for proceedings before and after notice of trial, and the court may also grant an additional allowance of costs, not exceeding five per centum upon the amount awarded. The court shall also direct in the final order what sum shall be paid to the general or special guardian, or committee or trustee of an infant, idiot, lunatic, or habitual drunkard, or to an attorney appointed by the court to attend to the interests of any defendant upon whom other than personal service of the petition and notice may have been made, and who has not appeared, for costs, expenses, and counsel fees, and by whom or out of what fund the same shall be paid. If a trial has been had and all the issues determined in favor of the plaintiff, costs of the trial shall not be allowed to the defendant, but the plaintiff shall recover of any defendant answering the costs of such trial caused by the interposition of the unsuccessful defence, to be taxed by the clerk at the same rate as is allowed to the prevailing party for the trial of an action in the Supreme Court.

A proceeding to acquire land under the General Railroad Act is a special proceeding, and the court has power, in its discretion, to allow costs in such proceedings at the rate allowed for similar services under the Code. *Matter of Rensselaer & S. R. R. Co. v. Davis*, 55 N. Y. 145; *Matter of Syracuse, B. & N. Y. R. R. Co.*, 4 Hun, 311; *Matter of N. Y., Lackawanna & W. R. R. Co.*, 26 id. 592. But no extra allowance can be granted. 55 N. Y., *supra*; *Matter of Syracuse, B. & N. Y. R. R. Co.*, 4 Hun, 311. When no issue of fact is raised or tried, a trial fee cannot be allowed, although witnesses' fees and disbursements may be allowed. 26 Hun, 592, *supra*. The General Term has no power, on reversing an order confirming a report of commissioners awarding damages, to award costs against the land owner. *Matter of N. Y., W. S. & B. R. R. Co.*, 94 N. Y. 287. One petition to acquire the land of several owners is but one proceeding, and requires one appeal and one allowance of costs. *Matter of Prospect Park, etc., R. R. Co.*, 67 N. Y. 371, affirming 8 Hun, 30. An extra allowance can be granted as a condition of discontinuance after report and before confirmation. *N. Y., W. S. & B. R. R. Co. v. Thorne*, 1 How. (N. S.) 190.

A proceeding to acquire property by the right of eminent domain is a special proceeding, and a judgment should not be

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entered, but costs taxed and inserted in the General Term order affirming the order of the Special Term. *Matter of Board of Education of Brooklyn*, 34 St. Rep. 493, 19 Civ. Pro, 420, 11 Supp. 780.

An application for an order appointing commissioners to appraise the damages caused by an extension of a street is a special proceeding, and costs on an appeal therefrom may, in the discretion of the court, be awarded to either party at the rates allowed on an appeal from the judgment in an action in the same court. *Matter of South Market Street*, 80 Hun, 246, 61 St. Rep. 626, 29 Supp. 1030.

The fact that the plaintiff is entitled to the costs of the trial of the issue joined by the pleading does not deprive all the defendants of their rights and the other taxable costs where the award is greater than the offer. *Matter of Manhattan Railway Co.*, 78 Hun, 434, 60 St. Rep. 781, 29 Supp. 220.

A defendant in condemnation proceedings is only entitled to costs on the preliminary hearing where the petition is dismissed. *Dansville R. R. Co. v. Hammond*, 77 Hun, 39, 59 St. Rep. 49, 28 Supp. 454.

Failure of the petitioner to make a preliminary offer of purchase does not entitle the defendants to costs under § 3372, where they were under legal disability to convey. *Matter of Manhattan Railway Co. v. McKee*, 1 App. Div. 488, 37 Supp. 269, 72 St. Rep. 595.

Where there is no allegation in the petition or proof that the plaintiffs have made an offer to purchase the property, though there is an adjudication of another court that the parties were unable to agree as to the price, defendants are entitled to costs. *Matter of Manhattan Railway Co. v. Kent*, 80 Hun, 557, 30 Supp. 957, 62 St. Rep. 569.

Where the court as a matter of favor opens the default of an owner who fails to appear before commissioners and sends back their report for further hearing, the party relieved should pay the costs of the former hearing. *Matter of Brownell Street*, 44 St. Rep. 485, 17 Supp. 747.

In a proceeding where there has been a trial, the appeal taken from an order granting the application and costs as in an action may be allowed under § 3240 of the Code. *Matter of Long*, 39 St. Rep. 892, 15 Supp. 657. Commissioners have no authority

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to fix any allowance for counsel fees, but that power is vested in the court. *Matter of Daley*, 91 Hun, 641, 37 Supp. 128, 72 St. Rep. 735.

Separate bills of costs are not allowed against defendants who are proceeded against as partners and joint owners of the property, and who jointly answer. *City of Syracuse v. Benedict*, 86 Hun, 343, 33 Supp. 944, 67 St. Rep. 614. The trial spoken of in the statute is that which takes place before the court before the appointment of the commissioners; the proceeding before the commissioners is not a trial within the meaning of the statute, but an assessment of damages. *Matter of Manhattan Railway Co. v. Kent*, 80 Hun, 559, 30 Supp. 959.

The court has power to grant an additional allowance where no offer to purchase has been made, even when an answer has been interposed and the hearing was not difficult or extraordinary, but the defendants are not entitled to a trial fee, as the hearing is not a trial; nor do §§ 3251 and 1015 control the amount of costs. *Matter of L. S. & M. S. R. R. Co.*, 65 Hun, 538, 48 St. Rep. 360, 20 Supp. 573. The extra allowance contemplated by § 3372 is intended as an indemnity to the prevailing party for expenses necessarily or reasonably to be incurred in the proceeding. *St. Lawrence & Adirondack R. R. Co. v. DeCamp*, 52 St. Rep. 10, 23 Supp. 544.

In proceedings in the United States Federal court to acquire lands in this State, provisions of the Code as to extra allowance are applicable. *United States v. Engeman*, 27 Abb. N. C. 141. Section 3054, limiting extra allowances to \$2,000, does not apply to allowances in condemnation proceedings. *Matter of City of Brooklyn*, 10 Misc. 650, 24 Civ. Pro. 182, 32 Supp. 182, 65 St. Rep. 261. Where the court has awarded costs, its judgment cannot be reviewed in this respect on taxation, the remedy is by motion to correct the judgment; and by an appeal from an order denying such motion, if it is denied, or by appeal from the judgment. *Matter of Manhattan Railway Co. v. Youmans*, 81 Hun, 82, 30 Supp. 566, 62 St. Rep. 562.

It has been the settled practice of the courts not to allow costs in proceedings for condemning the right of way for elevated railroad. *Matter of the Union Elevated R. R. of Brooklyn*, 55 Hun, 161, 28 St. Rep. 386, 7 Supp. 853. Where there is no statute providing for costs and disbursements in legal proceedings, none can

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be recovered. The authority given by § 3372 of the Code to grant an extra allowance to a defendant in condemnation proceedings relates entirely to proceedings taken under chapter 23 of the Code, and does not extend to proceedings taken under a subsequent special statute. In such proceedings taken under a special statute, where there is no provision for costs, they are governed by the general statute as costs in special proceedings, § 3240, which does not authorize an additional allowance. *Matter of Application of the City of Brooklyn*, 148 N. Y. 107; *Matter of Application of the Grade Crossing Commissioners of the City of Buffalo*, 20 App. Div. 271.

An application to the Special Term, under § 11 of the General Railroad Act, by a railroad company for authority to construct its road upon the street in an incorporated village, is a special proceeding, and costs as of an action are allowable therein in the discretion of the court under § 3240. Cited, with approval, *Hornellsville Railroad Co. v. N. Y., L. E. & W. R. R. Co.*, 83 Hun, 407, where it is held that such a proceeding is not a condemnation proceeding to acquire title to land in the strict sense of the term, and that the rule of discretion in regard to the granting of costs is applicable to such a proceeding. That the word "trial" as used in § 3372 of the Code refers to the trials of the issues raised by the petition and answer referred to in § 3367.

Under § 3240 costs of appeal to the court of record in a special proceeding, where not specially regulated by the Code, may be awarded in the discretion of the court at rates allowed for similar services in an action. A proceeding under the General Railroad Act is a special proceeding, and costs should be allowed in such proceeding, the same as if in civil action. *Matter of South Market Street*, 80 Hun, 246.

An application by commissioners of estimate and assessment for an extra allowance under § 1000 of the Consolidation Act must be made at the time of the taxation of costs, and the court has no authority to make such allowance at any other time or upon notice to the corporation counsel alone. *Matter of Mayor*, 29 App. Div. 367, 51 N. Y. Supp. (85 St. Rep.) 470.

Commissioners appointed to take land for the city of New York before the new charter took effect are entitled, after January 1, 1893, to a per diem compensation of only \$6. *Matter of Mayor*, 24 Misc. 558.

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Where the proceedings embraced a large number of parcels of property and involved unusually difficult questions of law and fact, the commissioners are entitled to extra allowance. *Matter of Mayor*, 24 Misc. 558. See act amending § 3370, Code Civil Procedure, in relation of fees of commissioners in condemnation proceedings, by allowing additional compensation not exceeding \$25 a day in proceedings within New York and Kings Counties. Laws 1898, chapter 384.

SUB. 3. EFFECT OF FINAL ORDER, AND HOW ENFORCED. § 3373.

§ 3373. Judgment, how enforced; delivery possession of premises; when writ of assistance to issue.

Upon the entry of the final order, the same shall be attached to the judgment roll in the proceeding, and the amount directed to be paid, either as compensation to the owners, or for the costs or expenses of the proceeding, shall be docketed as a judgment against the person who is directed to pay the same, and it shall have all the force and effect of a money judgment in an action in the Supreme Court, and collection thereof may be enforced by execution and by the same proceedings as judgments for the recovery of money in the Supreme Court may be enforced under the provisions of this act. When payment of the compensation awarded, and costs of the proceeding, if any, has been made, as directed in the final order, and a certified copy of such order has been served upon the owner, he shall, upon demand of the plaintiff, deliver possession thereof to him, and in case possession is not delivered when demanded, the plaintiff may apply to the court without notice, unless the court shall require notice to be given, upon proof of such payment and of service of the copy order, and of the demand and non-compliance therewith, for a writ of assistance, and the court shall thereupon cause such writ to be issued, which shall be executed in the same manner as when issued in other cases for the delivery of possession of real property.

The confirmation of an award is in the nature of a judgment, and the statutory limit thereof is twenty years from the date thereof. *Board of Supervisors of Erie Co. v. City of Buffalo*, 18 Supp. 635.

No right is vested in the company to the lands, or in the owner to the moneys, until the court has confirmed the report of the commissioners. *Hudson River R. R. Co. v. Outwater*, 3 Sandf. 689. When the order has been recorded and the money deposited, the title is wholly vested in the company, and no longer remains in the former owner, and the company cannot, by changing the route, avoid paying compensation on the ground the land is unnecessary. *Crowner v. Watertown, etc., R. R. Co.*, 9 How. 457, decided before the present provision as to abandonment of the proceeding embodied in this section. Upon the consummation of the proceedings prescribed by the act, all per-

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sons who have been made parties to the proceedings are divested and barred of their interest in such land, and have no longer a legal right to keep the company out of possession. *Niagara Falls, etc., R. R. Co. v. Hotchkiss*, 16 Barb. 270. Where land has been condemned, the land owner, after the payment and deposit of the award, loses all estate in the land. *Matter of N. Y. & Harlem R. R. Co.*, 98 N. Y. 12; *Matter of N. Y., W. S. & B. R. R. Co.*, 94 id. 287. The railroad company cannot acquire any greater right than that of the parties against whom they proceeded. *Anderson v. Rochester, etc., R. R. Co.*, 9 How. 553.

A railroad company, under the statute enabling it to acquire title to lands, does not acquire the same unqualified title and right of disposition to the real estate taken for the road which individuals have in their lands, but the title to the land being limited in its use for the purpose of the railroad, it is subject to the exercise of all those powers reserved to the legislature to which the franchises of the corporation are subject. *Albany & Northern R. R. Co. v. Brownell*, 24 N. Y. 345. As to lands acquired for passenger and freight purposes, see chap. 282, § 17, Laws 1854. The title vested in the company is also subject to the duty on the part of the company to make and maintain suitable farm crossings, and the right of passage of the former owner over such crossings. *Wheeler v. Rochester, etc., R. R. Co.*, 12 Barb. 227. Title vests in the company only when it has fully performed and complied with the conditions precedent, and paid or deposited the compensation as required by law. *Bloodgood v. Mohawk R. R. Co.*, 18 Wend. 9; *Beekman v. Saratoga R. R. Co.*, 3 Paige, 45; *Clarkson v. H. R. R. Co.*, 12 N. Y. 304; *Ballou v. Ballou*, 78 id. 325. As to the right of the owner and effect of appraisal of damages, see *Gould v. H. R. R. Co.*, 6 N. Y. 522, as to riparian rights. It is said, § 216, Mills on Eminent Domain, that all elements of damages should be presented to the commissioners assessing the damages. The appraisement embraces all past, present, and future damages which the improvement may thereafter reasonably produce. But it is not to be assumed that the railroad will use unsafe appliances or perform a tortious act. *Mayor v. Bailey*, 2 Den. 233.

ARTICLE VIII.

STAY OF PROCEEDINGS AND APPEALS. §§ 3375, 3376, 3377.

§ 3375. [Am'd, 1895.] Appeal from final orders; stay.

Appeal may be taken to the appellate division of the Supreme Court from the final order, within the time provided for appeals from orders by title four of chapter twelve of this act, and all the provisions of such chapter relating to appeals to the appellate division of the Supreme Court from orders of the Special Term shall apply to such appeals. Such appeal will bring up for review all the proceedings subsequent to the judgment, but the judgment and proceedings antecedent thereto may be reviewed on such appeal, if the appellant states in his notice that the same will be brought up for review, and exceptions shall have been filed to the decision of the court or the referee, and a case or a case and exceptions shall have been made, settled, and allowed, as required by the provisions of this act, for the review of the trial of actions in the Supreme Court without a jury. The proceedings of the plaintiff shall not be stayed upon such an appeal, except by order of the court, upon notice to him, and the appeal shall not affect his possession of the property taken, and the appeal of a defendant shall not be heard except on his stipulation not to disturb such possession.

L. 1895, ch. 946.

§ 3376. [Am'd, 1895.] Appeal from judgment by plaintiff.

If a trial has been had and judgment entered in favor of the defendant, the plaintiff may appeal therefrom to the appellate division of the Supreme Court within the time provided for appeals from judgments by title four of chapter twelve of this act, and all the provisions of said chapter relating to appeals from judgments shall apply to such appeals; and on the hearing of the appeal the appellate division may affirm, reverse, or modify the judgment, and in case of reversal may grant a new trial, or direct that judgment be entered in favor of the plaintiff. If the judgment is affirmed, costs shall be allowed to the respondent, but if reversed or modified, no costs of the appeal shall be allowed to either party.

L. 1895, ch. 946.

§ 3377. When appellate division may direct a new appraisal.

On the hearing of the appeal from the final order the court may direct a new appraisal before the same or new commissioners, in its discretion, and the report of such commissioners shall be final and conclusive upon all parties interested. If the amount of the compensation to be paid is increased by the last report, the difference shall be a lien upon the land appraised, and shall be paid to the parties entitled to the same, or shall be deposited as the court shall direct; and if the amount is diminished, the difference shall be refunded to the plaintiff by the party to whom the same may have been paid, and judgment therefor may be rendered by the court, on the filing of the last report, against the parties liable to pay the same.

Any person deeming himself aggrieved may appeal. *N. Y. & Erie R. R. Co. v. Corcy*, 5 How. 177. And where the report embraces several interests, any person interested and made a party may appeal from such part of the report as affects him. *Troy & Rutland R. R. Co. v. Cleveland*, 6 How. 238. An appeal lies to the Court of Appeals from an order of the General Term,

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affirming an order of the Special Term in proceedings to acquire lands involving the question of the right to condemn such lands under the statute. *Reusselaer & S. R. R. Co. v. Davis*, 43 N. Y. 137. But it will not review matters of discretion. *N. Y. Central R. R. Co. v. Marvin*, 11 N. Y. 279; *Matter of N. Y. C. & H. R. R. Co.*, 64 id. 60; *Matter of Kings County Elevated R. R. Co.*, 82 id. 100. On appeal to the Court of Appeals no objection can be raised as to the irregularity in the proceedings, which were not taken below. *Buffalo & N. Y. City Co. v. Brainard*, 9 N. Y. 100. An order of the Supreme Court denying the owner's applications to have the report sent back with directions to state the ground of the commissioner's decision rests in discretion, and is not reviewable in the Court of Appeals; so, also, as to an order based on conflicting evidence, refusing to set aside an award on the ground of misconduct. *Matter of Prospect Park R. R. Co.*, 85 N. Y. 489, dismissing appeal from 24 Hun, 199. An appeal from an order awarding damages for lands condemned is a judicial proceeding, and an appeal in such proceeding is not reviewable in the Court of Appeals, except in case of a final order. The order made does not become final because the appraisal to be made by new commissioners may be final and conclusive under § 18. The Court of Appeals has no jurisdiction to review an order of the General Term, reversing an order of the Special Term making an award for lands condemned, and directing a new appraisal, where it does not appear that the order was not made in the exercise of the discretion confided in the court by the act, and the court cannot look into the opinion of the General Term for the grounds of the decision. *Matter of N. Y. & Harlem R. R. Co.*, 98 N. Y. 12. An appeal from so much of an order of the General Term, reversing an award confirmed by the Special Term, as refused to appoint new commissioners, when the latter were named in a stipulation, is reviewable in the Court of Appeals. *Matter of N. Y. & Lackawanna, etc., R. R. Co.*, 98 N. Y. 447. An appeal lies to the General Term from the order of the Special Term, confirming the report of commissioners. *Rochester, etc., R. R. Co. v. Beckwith*, 10 How. 168; *Rondout & Oswego R. R. Co. v. Field*, 38 id. 187. This is so, even though the appeal may have been heard in the first instance at Special Term, as is provided by this section. *Matter of Kings Bridge Road*, 4 Hun, 599, affirmed, 62 N. Y.

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645; *Albany & S. R. R. Co. v. Dayton*, 10 Abb. (N. S.) 182; *Matter of N. Y., W. S. & B. R. R. Co.*, 33 Hun, 231; see, also, *In re Commissioners of Central Park*, 4 Lans. 471; *Rensselaer & Saratoga R. Co. v. Davis*, 43 N. Y. 146; *R. & G. R. R. Co. v. Beckwith*, 10 How. 169. In a recent case a query is made as to whether the appeal should be from the report and appraisal, or from the order of confirmation. The point seems to be substantially a new one, the practice having been to appeal "from the appraisal and report, and from the order made thereon," thus covering both branches of the question.

In the absence of allegations of improper conduct on the part of a commissioner who was not a freeholder, the General Term will not entertain an application to set aside a report on that ground when the point was not raised below. *Matter of N. Y., W. S. & B. R. R. Co.*, 35 Hun, 575. The rule which deprives a party of the right to appeal from an order or judgment under which he has taken a benefit is not applicable to these proceedings, and the right to appeal is not affected by accepting payment for the land and giving a receipt therefor. *Matter of N. Y. & Harlem R. R. Co.*, 98 N. Y. 12. Where a report of damages is set aside and new proceedings are instituted, in which the company deposits a sum of money in court to secure any award that may be made, and upon confirmation of a second award pays the damages and takes possession, this does not bar the right of appeal. *Matter of N. Y., W. S. & B. R. R. Co.*, 29 Hun, 646. The Supreme Court will not set aside an award for every technical error, where no injustice appears to have been done. *N. Y. Central R. R. Co. v. Marvin*, 11 N. Y. 279, citing *Troy & Boston R. R. Co. v. Northern Turnpike Company*, 16 Barb. 100, which holds that the error to be reviewed must be of such a character as to show that the commissioners misapplied the principles upon which they were required to make their appraisal, and that the party appealing may have been injuriously affected by such misappropriation. Same principle, *Matter of Rondout & Oswego R. R. Co. v. Deyo*, 5 Lans. 298; *Matter of Bushwick Avenue*, 48 Barb. 9; *Troy & Boston R. R. Co. v. Lee*, 13 id. 169. Only the record before the commissioners can be reviewed. *N. Y. & Erie R. R. Co. v. Coburn*, 6 How. 223; *N. Y. & Erie R. R. Co. v. Corcy*, 5 id. 177; *Rochester & Syracuse R. R. Co. v. Budlong*, 6 id. 467; *Rochester & Genesee Valley R. R. Co. v. Beckwith*, 10 id.

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168; *Rondout & Oswego R. R. Co. v. Field*, 38 id. 187. The appellate court will not disturb an appraisal for technical errors, or unless the commissioners have clearly gone astray and disregarded legal principles. *Matter of N. Y., Lackawanna & W. R. R. Co. v. Arnott*, 27 Hun, 151; *Matter of N. Y., West Shore & B. R. R. Co. v. Dudleyston*, 29 id. 603; *Troy & Boston R. R. Co. v. Lee*, 13 Barb. 169; *N. Y., West Shore & B. R. R. Co. v. Gennet*, 37 Hun, 317. In reversing an order of a Special Term appointing commissioners of appraisal on application of the railroad company, it is the duty of the court at General Term to examine the evidence and determine whether the petitioner has fairly made out a case establishing that the premises are necessary for its use; when this appears, and where the company has acted in good faith and exercised a reasonable discretion, the court will not interfere, although in a proper case it has the power. *N. Y., Lackawanna, etc., R. R. Co. v. Union Steamboat Co.*, 35 Hun, 220. A report which awards a moderate compensation to the property owner will not be disturbed. *Matter of N. Y., Woodhaven, etc., R. R. Co.*, 21 Hun, 250. A report will not be set aside unless the sum awarded is grossly inadequate, or some wrong principle was adopted in determining it. *Matter of Boston R. R. Co.*, 27 Hun, 409. The court will not set aside an appraisal as excessive, unless the excess is plain and palpable upon the evidence. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 27 Hun, 116. It is not sufficient ground to set aside an appraisal, that during an examination of the premises by the commissioners, one of them was separated a part of the time from the others. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 63 How. 265.

If the commissioners reject legal and competent evidence, or mistake the principle that should govern the appraisement, the award should be set aside. *Matter of N. Y. C. R. R. Co.*, 15 Hun, 63. As to what is sufficient evidence of misconduct to set aside report, see *Matter of N. Y. C. R. R. Co.*, 5 Hun, 105. The report of the commissioners cannot be affected by a certificate signed by one of them, setting forth the rule adopted by them in estimating the damages, nor will such a certificate cure any error by the commissioners. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 29 Hun, 1. A report of damages will be set aside where land owner declined to produce witnesses before the commissioners, in consequence of erroneous information as to his legal

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rights. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 63 How. 265 ; see, also, *N. Y., Lackawanna & W. R. R. Co. v. Wolfe*, 29 Hun, 602.

The report may be set aside where it appears the commissioners had talked privately with a person from whom they had obtained information discrediting the claimant's testimony, and the award to him was greatly inadequate, also where neglect to oppose the confirmation of the report arose from neglect or misbehavior of his attorney, on whom notice of motion was served. *Matter of N. Y. Central R. R. Co.*, 5 Hun, 105, appeal dismissed, 64 N. Y. 60. Where the commissioners awarded much less than the value of the property taken, according to the testimony of every witness put upon the stand, it was held an arbitrary exercise of power not justified by law. *N. Y., West Shore & B. R. R. Co. v. Yates*, 18 Week. Dig. 272. Where counsel sent a letter to the commissioners after the case had been submitted to them, but the letter contained only certain computations which had been made orally before the commissioners, *held*, an irregularity, but not such as to vitiate the report. *N. Y., West Shore & B. R. R. Co. v. Church*, 31 Hun, 440. It is error to charge the owner with service and expenses of commissioners in a case where a less amount was awarded than the company had offered, when it appeared that the acceptance of the offer would have deprived the owner of costs in a pending ejectment suit. *Ulster & Delaware R. R. Co. v. Gross*, 31 Hun, 83. See cases cited under § 17, relative to confirmation of report.

The provision that the determination as to damages for land taken, made by commissioners of appraisal in their second report, shall be final and conclusive, precludes as well a review by a common-law *certiorari* as by appeal. *People ex rel. Schuylerville, etc., R. R. Co. v. Betts*, 55 N. Y. 600. Such second report being final and conclusive in itself, it needs no order of confirmation, and is not reviewable on appeal. *Matter of Prospect Park & C. I. R. R. Co.*, 85 N. Y. 489, dismissing appeal from 24 Hun, 199. Only legal errors and irregularities can be reviewed on second report. The judgment of the commissioners, in deciding upon the amount of damages to be allowed, cannot be reviewed. *Matter of Prospect Park & C. I. R. R.*, 20 Hun, 184. To authorize a court to review on motion a second report, something more must be apparent than such errors of law or fact as are

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reviewable on appeal, and which would, if established, require a reversal and new hearing. There must be such an irregularity, fraud, or mistake in the proceedings of the commissioners as would authorize the court under its established practice to set aside a judgment or verdict in an action on a motion. The report cannot be set aside because of an error committed by the commissioners in hearing or excluding testimony to which one of the parties objected, nor because of any ordinary ruling in the progress of a trial to which an objecting party must reserve his right of remedy by an exception. *Matter of N. Y. Elevated R. R. Co.*, 41 Hun, 502. Although under the statute the petitioner cannot on appeal obtain a review on the merits of the second award, yet it is within the power of a court of equity to set aside any excessive award obtained by fraud or misconduct of the commissioners. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 2 St. Rep. 456. The Supreme Court may set aside the second report and remove the commissioners on account of gross error and misconduct. *Matter of Prospect Park & C. I. R. R. Co.*, 20 Hun, 184. A method of correcting error on a new appraisal may arise should the new appraisers proceed on fundamentally erroneous view of the law. *Matter of N. Y. & Harlem R. R. Co.*, 98 N. Y. 12. The refusal of commissioners to conform to the decision of the Supreme Court on the first hearing is misconduct for which they may be removed. *N. Y., Lackawanna & W. R. R. Co v. Bennett*, 2 How. (N. S.) 225. The rule that the court may inquire into the fairness and regularity of the commissioners' acts, notwithstanding the provisions that the second report shall be conclusive, *held*, to apply where the commissioners examined the premises and listened to the owner's representations concerning the same in the absence of a representative of the company. The commissioners have no right to accept gratuities from either party, or to accept money in excess of what is allowed by law after the report is signed. *Matter of B., N. Y. & P. R. R. Co.*, 32 Hun, 289.

The statute requires the person receiving the first award to repay the difference between the first and second award, where the second is smaller than the first, and he is not obliged to pay interest thereon except from the date of notice of confirmation of the last award. *Matter of N. Y. Elevated R. R. Co.*, 44 Hun, 117. The statute as to conclusiveness of second award does not apply when the proceedings on the first appraisal are dismissed on appeal,

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without a refusal of confirmation, or any direction for new appraisal and new proceedings are instituted. *Matter of N. Y., W. S. & B. R. R. Co.*, 29 Hun, 646.

An appeal may be taken from an order appointing commissioners in condemnation proceedings. *Matter of B'dway & 7th Ave. R. R. Co.*, 69 Hun, 275, 53 St. Rep. 38, 23 Supp. 609. So an appeal may be taken from an order denying the motion for the appointment of commissioners. *Matter of Metropolitan Elevated R. R. Co.*, 136 N. Y. 500, 49 St. Rep. 648, reversing 49 St. Rep. 374, 20 Supp. 818. So an order appointing commissioners to condemn lands already appropriated to public use is appealable. *Matter of City of Utica*, 73 Hun, 256, 58 St. Rep. 80, 26 Supp. 564. An appeal will not lie to the Court of Appeals from an order confirming the report of commissioners; a second report of such commissioners is final and conclusive, unless there has been irregularity affecting their jurisdiction, or fraud, mistake, or accident such as would authorize a court of equity to set aside a judgment, referee's report, or award of arbitrators. Such report cannot be attacked collaterally by motion. *Matter of Southern Boulevard R. R. Co.*, 141 N. Y. 532, 57 St. Rep. 818; *Matter of Southern Boulevard R. R. Co.*, 143 N. Y. 253, 62 St. Rep. 150. An order sending back a report of commissioners in condemnation proceedings which is regular on its face for an itemized statement affects a substantial right of the relator to have it confirmed unless sufficient cause is shown, and is appealable. *B'd of Water Comrs. of Philmont v. Shutts*, 25 App. Div. 22, 49 Supp. 319, 83 St. Rep. 319. An order of General Term reversing an order of Special Term affirming an award of commissioners and dismissing the whole proceeding, leaving the client without any award whatever, is appealable to the Court of Appeals. *In re Clark v. Water Commissioners of Amsterdam*, 148 N. Y. 1, reversing 74 Hun, 294. But an order of the General Term, affirming an order of the Special Term, confirming the report of commissioners appointed under the provisions of the Rapid Transit Act, is not appealable when there is presented only an error of law or fact, and no question as to the jurisdiction of the commissioners is raised. *Matter of Brooklyn Elevated R. R. Co. v. Flynn*, 147 N. Y. 344, citing *Matter of the Metropolitan Elevated R. R. Co.*, 128 N. Y. 600, to the point that condemnation proceedings under this act were governed by the General

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Railroad Act of 1850, citing *Matter of the Commissioners of the State Reservation at Niagara*, 102 N. Y. 734, and holding that if the case presented a question of jurisdiction, the award might be different. *Matter of S. B. R. R. Co.*, 143 N. Y. 253. In *Matter of the Manhattan Railway Co. v. O'Sullivan*, 8 App. Div. 320, it was held, that an order confirming the report of commissioners is a final order, and the question whether an appeal lies to the Court of Appeals is a matter to be determined by that court. Holding further that, where the corporation instituting a proceeding desires to appeal from an award in favor of the owner for a substantial sum, the corporation should not be allowed to keep the property taken, and also retain, during the pendency of the appeal, the amount of the award.

Where commissioners make a merely nominal award, which is confirmed at Special Term but reversed at General Term, upon the ground that it was a case for substantial appraisal, the order is not appealable to the Court of Appeals. *Matter of Southern Boulevard R. R. Co.*, 128 N. Y. 93, 38 St. Rep. 844, affirming 58 Hun, 497, 35 St. Rep. 550, 12 Supp. 466. Appellate courts interfere with the amounts of awards with great reluctance. *Matter of Thompson*, 24 St. Rep. 433, 5 Supp. 370, 1 Silv. 389. Where no exception was taken at the trial, and the report, having evidence to support it, is affirmed, the appellate court will not interfere. *Matter of Metropolitan Elevated R. R. Co.*, 36 St. Rep. 224, 13 Supp. 159. Nor will it seek for technical errors in the admission or rejection of evidence, where no erroneous methods are shown, nor erroneous principles adopted by commissioners in making their award. *Matter of Silver Creek and Dunkirk Railway Co.*, 45 St. Rep. 66, 18 Supp. 331. The admission of evidence on the question of damages, of prices paid for adjacent property, is not grounds sufficient for reversal, where it is the best evidence to be had. *Langdon v. Mayor*, 133 N. Y. 628, 45 St. Rep. 191, 4 Silv. 271.

The fact that the commissioners made a personal inspection of the property, while not necessarily governing the action of the appellate court, has very great weight. *Aiken v. Water Commissioners of Amsterdam*, 82 Hun, 265, 63 St. Rep. 560, 31 Supp. 254; see, also, the *Matter of Gilroy*, 78 Hun, 260, 60 St. Rep. 237, 28 Supp. 910. The fact, however, that the commissioners viewed the premises and to some extent acted upon the infor-

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mation so obtained, does not prevent the court from reviewing their award on the question of damages. *Matter of Metropolitan Elevated R. R. Co.*, 76 Hun, 375, 59 St. Rep. 94, 27 Supp. 756. The award of commissioners is to be reviewed upon the facts as well as upon the law by the General Term. *Matter of Brooklyn Elevated R. R. Co.*, 80 Hun, 355, 61 St. Rep. 845, 30 Supp. 131. It is held, in *Matter of Metropolitan Elevated R. R. Co.*, 51 St. Rep. 827, 22 Supp. 298, that an appeal from an order of confirmation does not bring up for review any errors committed before the commissioners; to raise these questions the award must be appealed from. Section 3375 cuts off the absolute right of appellant to a stay of proceedings pending the appeal under § 1352, by simply giving an undertaking. The appellant's right to a stay pending appeal is not an absolute one, but whether it shall be granted or refused rests in the discretion of the court, and must be determined by the circumstances of each case. *Manhattan Railway Co. v. Stroub*, 70 Hun, 363, 24 Supp. 68, 53 St. Rep. 811.

Where an appeal is taken from a judgment, and order confirming an award, and the judgment is in favor of the one who holds the fee to certain property and against one who held the same under a lease from a former owner, the proceedings will not be stayed pending appeal, where defendant tenders no bond, and when it does not appear that plaintiff is not entirely able to make good all damages. *Matter of Manhattan Railway Co. v. Stroub*, 53 St. Rep. 811.

An appeal must be taken in the first instance to the General Term. *Matter of Metropolitan Elevated R. R. Co.*, 57 Hun, 130, 32 St. Rep. 828, 11 Supp. 191. So held as to proceedings under Laws of 1850. A petitioner who obtains an order confirming the report of commissioners is not prohibited from taking an appeal therefrom. *Matter of Metropolitan Elevated R. R. Co.*, 36 St. Rep. 606, 13 Supp. 367.

Where after trial before a referee of the issues raised by the answer to the petition in condemnation proceedings, a report has been made and judgment entered dismissing the petition with costs, but without prejudice to the plaintiff's right to begin other proceedings, an appeal therefrom by the defendant will be dismissed. *Village of Canadigua v. Benedict*, 13 App. Div. 600.

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ARTICLE IX.

POSSESSION OF PROPERTY AND DISTRIBUTION OF FUND.

§§ 3379, 3380, 3381, 3378.

§ 3379. Party in possession may stay on giving security.

At any stage of the proceeding the court may authorize the plaintiff, if in possession of the property sought to be condemned, to continue in possession, and may stay all actions or proceedings against him on account thereof, upon giving securities, or depositing such sum of money as the court may direct to be held as securities for the payment of the compensation which may be finally awarded to the owner therefor and the costs of the proceeding, and in every such case the owner may conduct the proceeding to a conclusion, if the plaintiff delays or neglects to prosecute the same.

§ 3380. Temporary possession pending proceedings.

When an answer to the petition has been interposed, and it appears to the satisfaction of the court that the public interests will be prejudiced by delay, it may direct that the plaintiff be permitted to enter immediately upon the real property to be taken, and devote it temporarily to the public use specified in the petition, upon depositing with the court the sum stated in the answer as the value of the property, and which sum shall be applied, so far as it may be necessary for that purpose, to the payment of the award that may be made, and the costs and expenses of the proceedings, and the residue, if any, returned to the plaintiff, and, in case the petition should be dismissed, or no award should be made, or the proceedings should be abandoned by the plaintiff, the court shall direct that the money so deposited, so far as it may be necessary, shall be applied to the payment of any damages which the defendant may have sustained by such entry upon and use of his property, and his costs and expenses of the proceeding, such damages to be ascertained by the court, or a referee to be appointed for that purpose, and if the sum so deposited shall be insufficient to pay such damages, and all costs and expenses awarded to the defendant, judgment shall be entered against the plaintiff for the deficiency, to be enforced and collected in the same manner as a judgment in the Supreme Court; and the possession of the property shall be restored to the defendant.

§ 3381. Notice of pendency of action to be filed.

Upon service of the petition, or at any time afterwards before the entry of the final order, the plaintiff may file in the clerk's office of each county where any part of the property is situated, a notice of the pendency of the proceeding, stating the names of the parties and the object of the proceeding, and containing a brief description of the property affected thereby, and from the time of filing, such notice shall be constructive notice to a purchaser, or incumbrancer of the property affected thereby, from or against a defendant with respect to whom the notice is directed to be indexed, as herein prescribed, and a person whose conveyance or incumbrance is subsequently executed or subsequently recorded, is bound by all proceedings taken in the proceeding after the filing of the notice, to the same extent as if he was a party thereto. The county clerk must immediately record such notice when filed in the book in his office kept for the purpose of recording notices of pendency of actions, and index it to the name of each defendant specified in the direction appended at the foot of the notice, and subscribed by the plaintiff or his attorney.

§ 3378. Conflicting claimants.

If there are adverse and conflicting claimants to the money, or any part of it, to be

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paid as compensation for the property taken, the court may direct the money to be paid into the court by the plaintiff, and may determine who is entitled to the same, and direct to whom the same shall be paid, and may, in its discretion, order a reference to ascertain the facts on which such determination and direction are to be made.

Section 3379 is constitutional. *Matter of St. Lawrence & Adirondack R. R. Co.*, 66 Hun, 306, citing *Matter of St. Lawrence & Adirondack R. R. Co.*, 133 N. Y. 270, as assuming the constitutionality of the act, the latter case holds that where a railroad company has unlawfully entered upon land under no pretence or claim of right, in defiance of the will of the owner, under no mistake or misapprehension and without color of authority, and thereafter commences proceeding to acquire title by condemnation, it is not within the provisions of the section empowering the court in condemnation proceedings to authorize the plaintiff to continue in possession, and providing that the court may stay all actions and proceedings. In 66 Hun, 306, *Matter of St. Lawrence & Adirondack R. R. Co.*, 133 N. Y. 270, is distinguished, and it is held that where the court states in its order that it appeared to its satisfaction that the plaintiff is in possession of the premises sought to be condemned, it is to be assumed on appeal that the court reached the conclusion that the company was in possession under a color of claim, or had acquired possession in good faith.

The purposes of the statute is to provide for the protection of the plaintiff's possession of property sought to be condemned during the pendency of the proceedings; it does not authorize the court to grant, after an order confirming an award has been entered, an order forever restricting defendants in such proceedings from maintaining actions in respect to the property. *Matter of Manhattan Railway Co. v. Tabor*, 78 Hun, 434, 60 St. Rep. 781, 29 Supp. 220.

The provisions of § 3378 are not in violation of the Constitution. The money directed to be paid may be deposited in bank under the order of the court, and when so deposited, it takes the place of the land as to the owner, and is the property of the parties entitled to compensation. There may be conflicting claimants to the fund, and the intervention of the court may be necessary for its distribution, or for the adjustment of liens. The fund is subject to the same liens to which the land was, before being taken. It does not affect the validity of an order, whether it directs the

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money to be drawn out on *ex parte* application, or on notice. *Matter of N. Y. C. & H. R. R. R. Co.*, 60 N. Y. 116. So held, under Railroad Act.

Under the former statute the Supreme Court had power to make an order or issue process to put a railroad company in possession of lands acquired by proceedings under the General Act. The object of the amendment was to give the court the same power in such proceedings to carry into effect the object and intent of the act which they had to carry into effect their own judgments and decree, and to assimilate the practice to that established in actions. *Matter of N. Y. C. & H. R. R. R. Co.*, 60 N. Y. 116. The authority of this section was not necessary to enable the court to carry out the powers conferred on it by the General Railroad Act; such a power was incident to the grant of powers under that statute, and enlarged construction should be given to the authority conferred. The order is in the nature of a writ of assistance. *Matter of N. Y. C. & H. R. R. R. Co.*, 2 Hun, 482; see, also, *Matter of Rhinebeck & Conn. R. R. Co.*, 8 id. 34; s. c. 67 N. Y. 242.

Moneys deposited by a city with a trust company pursuant to § 17 of chap. 490, Laws 1883, accompanied by an order for the payment of interest to the life tenant of the property taken and distribution of the principal on her death to the persons entitled thereto, remain subject to the orders of the court, which may direct their transfer to a county treasurer who will secure a higher rate of interest, but this can only be done on notice to the remaindermen. *Matter of Newton*, 26 App. Div. 547, 50 Supp. 543, 84 St. Rep. 543.

ARTICLE X.

MISCELLANEOUS PROVISIONS AND EXCEPTIONS. §§ 3368,
3382, 3383, 3374, 3384.

§ 3368. Certain provisions applicable.

The provisions of title one of chapter eight of this act shall also apply to proceedings had under this title.

§ 3382. Power of court to make necessary orders.

In proceedings under this title, where the mode or manner of conducting all or any of the proceedings therein is not expressly provided for by law, the court before whom such proceedings may be pending, shall have the power to make all necessary orders and give necessary directions to carry into effect the object and intent of this title, and of the several acts conferring authority to condemn lands for public use, and the

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practice in such cases shall conform, as near as may be, to the ordinary practice in such court.

§ 3383. Repealing clause ; limitations.

So much of all acts and parts of acts as prescribe a method of procedure in proceedings for the condemnation of real property for a public use is repealed, except such acts and part of acts as prescribe a method of procedure for the condemnation of real property for public use as a highway, or as a street, avenue, or public place in an incorporated city or village, or as may prescribe methods of procedure for such condemnation for any public use for, by, on behalf, on the part, or in the name of the corporation of the city of New York, known as the mayor, aldermen, and commonalty of the city of New York, or by whatever name known, or by or on the application of any board, department, commissioners, or other officers acting for or on behalf or in the name of such corporation or city, or where the title to the real property so to be acquired vests in such corporation or in such city ; and all proceedings for the condemnation of real property embraced within the exceptions enumerated in this section are exempted from the operation of this title.

§ 3374. [Am'd, 1894.] Abandonment and discontinuance of proceeding.

Upon the application of the plaintiff to be made at any time after the presentation of the petition and before the expiration of thirty days after the entry of the final order, upon eight days' notice of motion to all other parties to the proceeding who have appeared therein or upon an order to show cause, the court may, in its discretion, and for good cause shown, authorize and direct the abandonment and discontinuance of the proceeding, upon payment of the fees and expenses, if any, of the commissioners, and the costs and expenses directed to be paid in such final order, if such final order shall have been entered, and upon such other terms and conditions as the court may prescribe ; and upon the entry of the order granting such application and upon compliance with the terms and conditions therein prescribed, payment of the amount awarded for compensation, if such compensation shall have been theretofore awarded, shall not be enforced, but in such case, if such abandonment and discontinuance of the proceeding be directed upon the application of the plaintiff, the order granting such application, if permitting a renewal of such proceedings, shall provide that proceedings to acquire title to such lands or any part thereof shall not be renewed by the plaintiff without a tender or deposit in court of the amount of the award and interest thereon.

L. 1894, ch. 475.

§ 3384. When act takes effect.

This title shall take effect on the first day of May, one thousand eight hundred and ninety, and shall not affect any proceeding previously commenced.

The Supreme Court has power to vacate an order confirming the report of commissioners of appraisal, and thereupon to set aside the report and to appoint new commissioners. The owner is not confined to the remedy by appeal to the General Term given by the Railroad Act. Where cause is shown for setting aside the proceedings, the court is the judge of sufficiency thereof, and the granting such relief is within its discretion, the exercise whereof may be reviewed by the General Term, but not in the

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Court of Appeals. *Matter of N. Y. C. & H. R. R. Co.*, 64 N. Y. 60.

The Court of Appeals cannot review conflicting evidence. *Matter of Prospect Park & C. I. R. R. Co.*, 85 N. Y. 494. Where no irregularity appears to have intervened in any form in what took place before the commissioners, the report cannot be set aside. *Matter of N. Y. Elevated R. R. Co.*, 35 Hun, 417. Where commissioners were appointed and made a report which was reversed on appeal by the General Term, and that decision affirmed by the Court of Appeals, the matter was sent back to the same commissioners, the appellate court holding they had no power to appoint other commissioners than those named in an agreement made between the owner and the company, it was held that the court, on motion pending the second hearing, could vacate the order appointing the persons named to act as commissioners, upon the ground of misconduct. The court was not required to send the petitioner to a court of equity to obtain a decree. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 40 Hun, 130. Where, upon a hearing before commissioners, the owner makes default, the Supreme Court has power, on motion to confirm the report of the commissioners, the default being excused, to open it, set aside the report, and order a new hearing. *Matter of N. Y., Lackawanna & W. R. R. Co. v. Wolfe*, 93 N. Y. 385, affirming 29 Hun, 602. It is good cause for the Special Term to set aside the proceedings in such cases if there has been such carelessness or irregularity on the part of the commissioners as amounts to misconduct, by which a party has been harmed. The same reason which would lead to the setting aside of the verdict of a jury, or report of a referee, for the misconduct, palpable mistake, or accident of either, will suffice for the like interference with the report of commissioners, and what would authorize the Special Term to excuse the default of a party, and to set aside an inquest or dismissal of a complaint taken at a circuit, will empower it to interfere in these cases. *Matter of N. Y. C. & H. R. R. Co.*, 64 N. Y. 60.

CHAPTER XXVII.

PROCEEDINGS FOR SALE OF CORPORATE REAL ESTATE.

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ARTICLE I.

WHAT CORPORATIONS ARE AFFECTED BY THIS TITLE. § 3390.

§ 3390. Proceedings by corporations, etc., to be pursuant to the provisions of this title.

Whenever any corporation or joint-stock association is required by law to make application to the court for leave to mortgage, lease, or sell its real estate, the proceeding therefor shall be had pursuant to the provisions of this title.

The statute authorizing religious corporations to convey real estate by order of the court was first passed in 1806, and subsequently re-enacted in 1813, and is now part of the Revised Statutes, vol. 2, 7th edition, page 1661.

The history of legislation on this subject, in England as well as in this State, is considered in *De Ruyter v. The Trustees of St. Peter's Church*, 3 Barb. Ch. 119, and it seems that a common-law religious corporation had a right to alienate their real estate in the same manner as other corporations, until the time of Elizabeth, when statutes were passed restraining the alienation of real estate by such corporation, and these restrictions were held

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to be part of the common law of this State, although not re-enacted here. It is also held in *Montgomery v. Johnson*, 9 How. 232, that the common-law principle, that corporations, unless restrained by charter or statute, have power to sell, co-extensive with that of natural persons, does not apply to religious corporations. See, however, 10 Abb. (N. S.) 484. In *Matter of Reformed Dutch Church of Saugerties*, 16 Barb. 237, the statute is construed as prohibiting alienation of church property except by order of the court. The same case reiterates the rule of the statute (Code of Civil Procedure, § 217), that the Supreme Court is vested with the powers conferred upon the chancellor by the statute. The county court has jurisdiction under the provisions of § 340, subdivision 4, Code of Civil Procedure.

The Supreme Court has no power to direct or require the corporation to sell against its will. It may withhold its assent to the sale, and thus prevent the disposition of the property. This is the extent of its power. *Matter of Reformed Church of Saugerties*, *supra*. So the county court has only the special jurisdiction conferred on the chancellor by the statute, to direct the sale and application of the proceeds of the property of a religious corporation. It cannot increase or enlarge the powers of the trustees to appoint a receiver to dispose of the proceeds. The court has no power to order a sale for the purpose of closing up the existence of the society and distributing its property. *Wheaton v. Gates*, 18 N. Y. 395. The jurisdiction of a court to order a sale depends upon the facts before it at the time of making the order, and cannot be upheld by proof that facts which would have justified the order existed, but were not brought to its attention. *Madison Avenue Baptist Church v. Baptist Church in Oliver Street*, 73 N. Y. 82, affirming in part and reversing in part 41 N. Y. Super. 369. Religious corporations have no common law right to alienate their real estate, and to constitute a sale within the meaning of § 11. There must be a valuable consideration injuring to the corporation as such; therefore, an order of the Supreme Court, authorizing a conveyance founded upon a petition showing the only consideration for the contemplated transfer to be a benefit to the original corporators, is without jurisdiction, and a deed executed in pursuance thereof is void. *The Madison Avenue Baptist Church v. The Baptist Church in Oliver Street*, 46 N. Y. 131.

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The authority of the court to make an order for sale of real estate of a religious corporation relates to cases where the absolute right and title to lands belonging to the corporation is to be sold, and such assent is not necessary in case of the sale of a pew where the right of the owner is limited. *Freligh v. Platt*, 5 Cow. 494; *Voorthues v. Presbyterian Church of Amsterdam*, 8 Barb. 137; S. C. 17 id. 104. No order is necessary to authorize the mortgaging of church property. *Lee v. Methodist Episcopal Church of Fort Edward*, 52 Barb. 116; *Manning v. Moscow Presbyterian Society*, 27 id. 52; *South Baptist Society v. Clapp*, 18 id. 35; but see *Madison Ave. Baptist Church v. Baptist Church in Oliver St.*, 11 Abb. (N. S.) 132.

A religious corporation may sell buildings severed from land without leave of the court. *Beach v. Allen*, 7 Hun, 441. An order of the court is not necessary to enable a religious corporation, owning a cemetery, to convey burial lots therein to individuals for purposes of sepulture. So held in *Copper's Case*, 7 Abb. N. C. 121, reversed on appeal without opinion, as *Coppers v. Trustees*, 21 Hun, 233. A grant of a right of burial upon church property does not require an order of the court. So held where the conveyance purported to convey the fee, but for specific purpose of burial. *Richards v. Northwest Protestant Dutch Church*, 32 Barb. 42; *Matter of Reformed Church of New York*, 7 How. 476. In *Protestant Reformed Church of Rosendale v. Bogardus*, 5 Hun, 304, it is questioned whether the right of way over property belonging to the church is such an interest in land as requires the authority of the court for its sale by a religious corporation. It is not necessary to obtain the order of the court to authorize a change of location of church edifice. *Matter of Second Baptist Church of Canaan*, 20 How. 324. The act gives to religious corporations the unlimited right to convey real estate, provided the consent of the court is given, as required by the act. *The Reformed Protestant Dutch Church in Garden Street v. Mott*, 7 Paige, 77.

The above cases must be considered with reference to the Code provisions and statutes existing at the time of decision, and their present application taken with reference to the corporation laws now in force, and hereafter given.

It should be noted that this title, requiring application to the court for leave to mortgage, lease, or sell corporate real estate,

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applies only when leave of court so to do is required of the corporation.

Authority is expressly conferred by this title, which amended Laws 1813, chapter 60, upon the Supreme Court at Special Term, or the county court, to entertain an application by a religious corporation for leave to mortgage its real estate, and upon obtaining such leave, the corporation has power to mortgage its lands as provided by the order made on such application. *Matter of Church of Messiah*, 25 Abb. N. C. 354, 12 Supp. 489.

This title took effect May 1, 1890, as to the regularity of sales, etc., under proceedings commenced since then to be tested by the new act which amended Laws 1830, chapter 60. Note to *Matter of Church of the Messiah*, 25 Abb. N. C. 354.

Following are given the sections of the Corporation Laws which refer to the sale or mortgage of corporate real property, where the same is required to be by leave of court.

A religious corporation shall not sell or mortgage any of its real property without applying for and obtaining leave of the court therefor pursuant to the provisions of the Code of Civil Procedure. The trustees of an incorporated Protestant Episcopal church shall not vote upon any resolution or proposition for the sale, mortgage, or lease of its real property, unless the rector of such church, if it then has a rector, shall be present. The trustees of an incorporated Roman Catholic church shall not make application to the court for leave to mortgage, lease, or sell any of its real property without the consent of the archbishop or bishop of the diocese to which such church belongs, or in case of their absence or inability to act, without the consent of the vicar-general or administrator of such diocese. The petition of the trustees of an incorporated Protestant Episcopal church or Roman Catholic church shall, in addition to the matters required by the Code of Civil Procedure to be set forth therein, set forth that this section was also complied with. But lots, plats, or burial permits in a cemetery owned by a religious corporation may be sold without applying for or obtaining leave of the court. No cemetery lands of a religious corporation shall be mortgaged while used for cemetery purposes. Religious Corporation Law, § 11, Laws 1895; chap. 723, as amended, Laws 1896, chap. 336.

As to the property of extinct churches, see Religious Corporations Law, § 15, which, among other things, provides that the

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incorporated governing body of a church "may decide that a church, parish or society in connection with it or over which it has ecclesiastical jurisdiction has become extinct if it has failed for two consecutive years next prior thereto to maintain religious services, according to the discipline, customs, and usages of such governing body, or has had less than thirteen resident attending members paying annual pew rent or making annual contribution towards its support, and may take possession of the temporalities and property belonging to such church, parish, or religious society and manage; or may, in pursuance of the provisions of law relating to the disposition of real property by religious corporations, sell or dispose of the same, and apply the proceeds thereof to any of the purposes to which the property of such governing religious body is devoted, and it shall not divert such property to any other object." The section goes on to state what shall be deemed the governing religious body of various denominations. Religious Corporations Law, § 15, Laws 1895, chap. 723, as amended, Laws 1896, chap. 336 and 337.

As to the sale or disposition of the real property of a Protestant Episcopal parish or church, see § 32, Religious Corporations Law, which provides, among other things, "but if there be a rector of the parish no measure shall be taken in his absence in any case for effecting the sale or disposition of the real property of the corporation, nor for the sale or disposition of the capital or principal of the personal property of the corporation, nor shall any act be done which shall impair the rights of such rector." Religious Corporations Law, § 32, Laws 1895, chap. 723, § 32, as amended, Laws 1898, chap. 358.

In connection with the acts of the trustees of an incorporated Roman Catholic or Greek church, see § 51, Religious Corporations Law, which, among other things, provides: "No act or proceeding of the trustees of any such incorporated church shall be valid without the sanction of the archbishop or bishop of the diocese to which such church belongs, or in case of their absence or inability to act, without the sanction of the vicar-general or of the administrator of such diocese." Religious Corporations Law, § 51, Laws 1895, chap. 723.

As to Reformed Protestant Dutch churches, see Religious Corporations Law, § 60a, which, among other things, provides: "That the general synod of the Reformed Protestant Dutch

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church shall be and hereby is declared to be a body politic and corporate by the name and style of the 'General Synod of the Reformed Protestant Dutch Church,' with full power to sue and be sued, etc., * * * and also to take, purchase, and hold real and personal estate and to sell and convey the same, provided the yearly value of such real and personal estate shall not exceed the sum of \$10,000, and that the same shall not be appropriated to any other than religious and charitable uses and purposes." Laws 1819, chap. 110, § 1.

As to the property, real and personal, of any Free Baptist church or Free Baptist religious society, organized under the Laws of the State of New York, that has become or shall become extinct, see Religious Corporations Law, § 77a, Laws 1896, chap. 308, § 1.

As to the property of Baptist corporations, see Religious Corporations Law, § 77, which, among other things, empowers, "Any incorporated Baptist church created by or existing under the Laws of the State of New York, having its principal office or place of worship in the State of New York, or whose last place of worship was within the State of New York, is hereby authorized and empowered by a vote of two-thirds of its qualified voters present and voting therefor, at a meeting regularly called for that purpose, to transfer and convey any of its property, real or personal, which it now has or may hereafter acquire, to any religious, charitable, or missionary corporation connected with the Baptist denominations and incorporated by or organized under any law or laws of the State of New York, either solely or among other purposes to establish or maintain or to assist in establishing or maintaining churches, schools, or mission stations, or to erect or assist in the erection of such buildings as may be necessary for any of such purposes, and on or without the payment of any money or other consideration therefor, and upon such transfer or conveyance being made the title to and the ownership and right of possession of the property so transferred and conveyed shall be vested in and conveyed to such grantee; provided, however, that nothing herein contained shall impair or affect in any way any existing claim upon or lien against any property so transferred or conveyed, or any action at law or legal proceeding, and subject in respect to the amount of property the said grantee may take and

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hold to the restrictions and limitations of existing laws. Religious Corporations Law, § 77, Laws 1895, chap. 723. For a proceeding to declare a Free Baptist church or other Baptist religious society extinct, see Religious Corporations Law, § 77b, Laws 1895, chap. 723. As to conveyance of trust property of a religious society of friends, see Religious Corporations Law, § 93, Laws 1895, chap. 723.

As to the property of union churches or societies, see Religious Corporations Law, § 101, which provides, among other things, that "Any society composing such union church or society which has built for itself a church edifice and become incorporated, may sell its interest and right of occupancy in such union society, and convey the same, when authorized so to do by a two-thirds vote of the voters thereof qualified to vote for union trustees at a special meeting called for that purpose. The proceeds of such sale shall be used for the benefits of its church property." Religious Corporations Law, § 101, Laws 1895, chap. 723.

As to the alienation of real estate of free churches and chapels, see Religious Corporations Law, § 116, providing as follows: "The seats and pews in every church building or edifice owned or occupied by any corporation organized under this act shall be forever free for the occupation and use during public worship, of all persons choosing to occupy the same and conducting themselves with propriety, and no rent, charge, or exaction shall ever be made or demanded for such occupation or use, nor shall any real estate belonging to any such corporation be sold or mortgaged by the trustees thereof, unless by the direction of the Supreme Court to be given in the same manner and in the like cases as provided by law in relation to religious incorporations." Laws 1854, chap. 218, § 4.

Membership Corporations.—The provisions governing the purchase, sale, mortgage, and lease of the real property by membership corporations are found in § 13, Membership Corporations Law, as follows: "No purchase, sale, mortgage, or lease of real property shall be made by a membership corporation unless ordered by the concurring vote of at least two-thirds of the whole number of its directors. *No real property of a membership corporation shall be leased without leave of the court for a longer period than three years, or sold, or mortgaged.* A mort-

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gage may be executed to secure the payment of bonds issued or to be issued to different persons. The court may grant leave to a membership corporation to convey real property without consideration to another membership corporation created for the same or kindred purposes. If a mortgage of the real property of any such corporation be executed and delivered without leave of the court, the court may thereafter on such proceedings as are required to obtain leave of the court to mortgage such property, confirm such previously executed mortgage, and thereon such mortgage shall be as valid and of the same force and effect as if it had been executed and delivered with leave of the court, except as to purchasers or incumbrancers of such real property, subsequent to the execution and delivery of such mortgage. A membership corporation may, if its by-laws so provide, and pursuant to the provisions thereof, and without leave of the court, convey to a member of the corporation a portion of its real property, for the erection thereupon of a cottage or other dwelling-house, with suitable outbuildings, on the terms and conditions that such portion together with the buildings thereupon shall belong to such member, and on his death pass as part of his estate to his heirs or devisees, but that the land whereupon such buildings shall be erected, shall be inalienable by him or them, except to the corporation or to a member thereof, and that such member in his lifetime, or after his death, his heirs or devisees, may convey such interests in such real property to the corporation or to a member thereof, for such sum as may be mutually agreed on, but not to any other person. Such conveyance may provide that the grantees of the interest in each lot so conveyed shall be entitled to one vote, either in person or by proxy, at all meetings of the corporation, if the by-laws authorize such a provision. Except as otherwise provided in this chapter, no portion of a cemetery or of a cemetery corporation which any person other than the corporation is entitled to use for burial purposes, or in which burials have been made, and not lawfully removed, shall be sold, mortgaged, or leased by the corporation." Membership Corporations Law, § 13, Laws 1895, chap. 559.

As membership corporations are among those which can only sell, mortgage, or lease real property by leave of the court, it is important to determine what are membership corporations. Such corporations are defined by § 2, Membership Corporations

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Law : " Neither the term membership corporation, nor the term membership corporation created by special law, includes a stock corporation or a corporation organized for pecuniary profit, or a corporation subject to any of the provisions of the Insurance Law. Subject to such exceptions the term 'membership corporations' means, a corporation hereafter incorporated under this chapter, or heretofore incorporated under any law repealed by this chapter, but does not include a membership corporation created by special law, and the term 'membership corporation created by special law' means, a corporation created by special law for purposes for all of which a corporation might be created under this chapter." Laws 1895, ch. 559, § 2.

A membership corporation may be created under this article for any lawful purpose except a purpose for which a corporation may be created under any other article of this chapter, or any other general law than this chapter. Membership Corporations Law, § 30. Among the membership corporations specially mentioned in the Membership Corporations Law, are Cemetery Corporations, §§ 40 to 57; Fire Corporations, §§ 65 and 66; Corporations for the Prevention of Cruelty, §§ 70 to 72; Hospital Corporations, § 80; Christian Associations, §§ 90 and 91; Bar Associations, § 100; Veteran Soldiers' and Sailors' Associations, §§ 110 to 112; Soldiers' Monument Corporations, §§ 120 to 122; Boards of Trade, §§ 130 and 131; Agricultural and Horticultural Corporations, §§ 140 to 148. And as has been noted, corporations for purposes not elsewhere authorized, §§ 30 and 31.

A list of the corporations heretofore existing, which are brought under the present Membership Corporations Law by the repeal of the acts under which they were formerly chartered, will be found in 2 Birdseye, Statutes, 2d edition, page 1976. Library corporations were formerly chartered under Laws 1796, chapter 43, and Laws 1825, chapter 19. They are now to be chartered under the Membership Corporations Law. As to the sale of lots in cemetery corporations and the application of the proceeds of such sales, see Membership Corporations Law, §§ 49 and 50, Laws 1895, chap. 559.

"A cemetery which has heretofore issued such certificates of stock is a membership corporation, and not a stock corporation." Part of § 55, Membership Corporation Law, Laws 1895, chap. 559.

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Though veteran soldiers' and sailors' associations may in their by-laws provide that the property of the corporation shall be divided into transferable shares, etc., such corporation shall be a membership corporation, and not a stock corporation. See Membership Corporations Law, § 111, Laws 1895, chap. 559. Though boards of trade are included under the Membership Corporations Law, it is by § 131 of that law provided, "A board of trade heretofore incorporated under a law repealed by this chapter which has issued capital stock entitling the holders of the shares thereof to dividends from the profits of the corporation shall hereafter be subject to the provisions of the Business Corporation Law, the Stock Corporation Law, and the General Corporation Law, and not to the provisions of this chapter." Membership Corporations Law, § 131, Laws 1895, chap. 559.

Though agricultural and horticultural corporations are provided for in the Membership Corporations Law, yet by virtue of § 144 such corporation may, by a majority vote of the members present and voting at a regularly called meeting, and by filing a certificate to that effect in the county clerk's office where a certificate of incorporation is filed, fix the amount of capital stock which such corporation shall have not more than forty thousand nor less than five thousand dollars, etc. " * * * An agricultural corporation incorporated under this chapter, or a law repealed hereby, which has issued or shall hereafter issue capital stock entitling the holders of the shares thereof to dividends from the profits of the corporation, shall be subject to the Business Corporations Law, the Stock Corporation Law, and the General Corporation Law, and not to the provisions of this article in conflict therewith, nor to Article I. of this chapter." Section 144, Laws 1895, chapter 559. It should be noted that Article I., from which agricultural corporations issuing stock are exempted, contains the provision requiring application to the court for leave to sell, mortgage, or lease real property.

If a conveyance of land be made to a religious corporation absolutely and without condition or reservation, no trust is created beyond the duty imposed by law upon the corporation of using this property for the purposes of its creation. As there is no trust fastened upon the land, the corporation may, with judicial consent, sell and convey a good title, the proceeds in such case taking the place of the land. *Matter of First Presbyterian Soci-*

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ety of Buffalo, 106 N. Y. 251. A religious or charitable corporation cannot mortgage its real estate without leave of the Supreme Court, and if it does so, the mortgage is void. *Dudley v. Congregation of the Third Order of St. Francis*, 138 N. Y. 451, 53 St. Rep. 19, affirming 65 Hun, 21, 47 St. Rep. 60, 19 Supp. 605.

It is said, in a note to *Matter of Church of the Messiah*, 25 Abb. N. C. 354, that it has long been the practice of the Supreme Court to entertain applications for leave to mortgage real estate of religious corporations under the provisions of the act of 1813 authorizing the chancellor to grant leave to sell, the mortgage being regarded merely as a conditional sale. Any question which may have existed as to the power of the court to grant leave to mortgage, the necessity of obtaining such leave, the proceedings, and the scope of the order directing the disposition of the proceeds are set at rest by the act of 1890.

Upon the foreclosure of a mortgage given by a religious or a charitable corporation, without leave of court, which is therefore void, the court will not allow the plaintiff to prove the loan and recover a judgment at law on the debt. *Dudley v. Congregation of the Third Order of St. Francis*, 138 N. Y. 451, 53 St. Rep. 19. It seems that a cemetery association, whose land cannot be used for cemetery purposes on account of a city ordinance, upon applying for a voluntary dissolution, should dispose of its land in the mode provided in the case of the dissolution of corporations. *People ex rel. O. H. C. Association v. Pratt*, 129 N. Y. 75.

ARTICLE II.

PETITION AND CONTENTS. § 3391.

§ 3391. Petition and contents.

The proceeding shall be instituted by the presentation to the Supreme Court of the district or the county court of the county where the real property, or some part of it, is situated, by the corporation or association, applicant, of a petition, setting forth the following facts :

1. The name of the corporation or association, and of its directors, trustees, or managers, and of its principal officers, and their places of residence.
2. The business of the corporation or association, or the object or purpose of its incorporation or formation, and a reference to the statute under which it was incorporated or formed.
3. A description of the real property to be sold, mortgaged, or leased, by metes and bounds, with reasonable certainty.
4. That the interests of the corporation or association will be promoted by the sale, mortgage, or lease, of the real property specified, and a concise statement of the reasons therefor.

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5. That such sale, mortgage, or lease has been authorized, by a vote of at least two-thirds of the directors, trustees, or managers of the corporation or association, at a meeting thereof, duly called and held, and a copy of the resolution granting such authority.

6. That the market value of the remaining real property of the corporation or association, and the cash value of its personal assets, and the total amount of its debts and liabilities, and how secured, if at all.

7. The application proposed to be made of the moneys realized from such sale, mortgage, or lease.

8. Where the consent of the shareholders, stockholders, or members of the corporation or association is required by law to be first obtained, a statement that such consent has been given, and a copy of the consent, or a certified transcript of the record of the meeting at which it was given, shall be annexed to the petition.

9. A demand for leave to mortgage, lease, or sell the real estate described.

The petition shall be verified in the same manner as a verified pleading in an action in a court of record.

Precedent for Petition. (25 Abb. N. C. 354.)

To the Supreme Court of the State of New York :

The petition of the rector, wardens, and vestrymen of the Church of the Messiah, a Protestant Episcopal church in the city of Brooklyn, respectfully represents :

1. That the name of the said corporation is, The Rector, Wardens, and Vestrymen of the Church of the Messiah, and the names of its trustees and its principal officers and their places of residence are as follows : (stating them.)

2. The object or purpose of the incorporation of said church is the propagating of the Christian religion, and said church as a religious association is duly incorporated under the act, entitled "An Act to amend the acts to provide for the incorporation of religious societies so far as the same relate to churches in connection with the Protestant Episcopal Church," passed May 9, 1868.

3. As such corporation they are the owners of the following described piece or parcel of land, situated in the twentieth ward of the city of Brooklyn, N. Y., bounded and described as follows : (description.)

4. Your petitioners further show that the interests of the said corporation or association will be promoted by the mortgage of the real property above specified, and the reasons therefor are as follows :

Your petitioners are desirous of mortgaging said real estate in the sum of twenty-five thousand dollars (\$25,000), payable in one year with interest, and the Dime Savings Bank of the city of Brooklyn, N. Y., has agreed to loan said sum to your petitioners upon the security of their bond and mortgage upon said property in the usual form ; your petitioners wish to borrow said sum upon the security of said mortgage because they have commenced the erection of a chapel upon said premises which adjoin the church edifice of your petitioners ; the necessities of your petitioners' congregation require the speedy completion of said chapel, and the contract for its erection calls for payments at stated intervals ; your petitioners have

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not sufficient funds to complete said chapel and fulfil the terms of said contract, and said mortgage is to be placed for the purpose of raising the necessary funds therefor ; it is expected that said mortgage will be paid at an early day from voluntary contributions by your petitioners' congregation. No real estate or interest in real estate, belonging to said corporation, has been sold or mortgaged under any order of the court at any time within five years last past.

5. That at a regular stated meeting of the trustees of the Church of the Messiah, held July 17, 1890, more than two-thirds of said trustees were present, and a resolution was unanimously adopted directing that this application be made. A copy of said resolution, attested by the church clerk, is hereunto annexed and made a part of this petition.

6. That the market value of the real property of said corporation or association is one hundred thousand dollars (\$100,000), upon which there is no incumbrance ; that said corporation or association has no outstanding debts or liabilities ; that the cash value of its personal assets is twenty thousand dollars (\$20,000).

7. Your petitioners show that they have no funds wherewith to complete said chapel, and it is proposed to apply the avails of said mortgage, when received by them, to payments for the erection of said chapel, as aforesaid.

8. Your petitioners therefore ask that an order be entered giving them leave to mortgage the real estate above described upon the terms aforesaid, and that the moneys realized from such mortgage be applied as above specified.

Petition for Leave to Mortgage.

To the Supreme Court of the State of New York :

The petition of the North Baptist Church and Congregation of the City of Troy, N. Y., respectfully shows :

First. That the petitioner is a religious corporation, and that its corporate name is the "North Baptist Church and Congregation of the City of Troy." That it is managed by trustees. That the whole number of its trustees is nine. That the names of the trustees and their places of residence respectively are as follows :

Otis G. Clark, residing at Troy, New York ; Stephen D. Sweet, residing at Troy, New York ; Don C. Woodcock, residing at Troy, New York ; Philander Pollock, residing at Troy, New York ; William A. Sherman, residing at Troy, New York ; James A. Dorrance, residing at Troy, New York ; William F. Gurley, residing at Troy, New York ; Halbert D. Hull, residing at Troy, New York ; Edward W. Douglas, residing at Troy, New York.

That the names of its principal officers and their places of residence are as follows :

Otis G. Clark, president, residing at Troy, New York ; Don C. Woodcock, secretary, residing at Troy, New York.

Second. That the business of the petitioner, and the object of its incorporation, is to enable its members to meet for divine worship

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and other religious observances, and the establishment and maintenance of a church for the furtherance of such objects, and that it was incorporated under and pursuant to an act of the legislature of the State of New York entitled "An Act to Provide for the Incorporation of Religious Societies, passed April 5, 1813." That its location and legal residence is in the city of Troy, New York.

Third. That the petitioner is the owner of certain real property, a description of which by metes and bounds is as follows :

(Description.)

Fourth. That the interest of the corporation will be promoted by the mortgaging of the real property above specified, and that a concise statement of the reasons therefor is as follows : The corporation is indebted in the sum of five thousand dollars, that the corporation has no money or other resources outside of the real estate above described and the real estate on which its church building stands, and the chattels and personal property which constitute the furniture and furnishing of its said church building, with which to pay said indebtedness, and it is necessary that the payment of said indebtedness should be provided for by the giving of a mortgage as a security for the loan of that amount, thereby extending the time of payment sufficiently to enable said corporation to acquire means to pay and cancel said indebtedness without sacrificing its property interests.

Fifth. That said mortgage has been authorized by a vote of at least two-thirds of the trustees of the petitioner, at a meeting thereof duly called and held, and a copy of the resolution granting such authority is made a part hereof, and reads as follows :

"Whereas, the members of the North Baptist Church and Congregation of the city of Troy, N. Y., have authorized and consented that the trustees of said corporation mortgage the following described property of said corporation, viz. : (description), for a sum not to exceed five thousand dollars, that being the amount required to pay debts incurred in the administration of the temporal affairs of said corporation ; and, whereas, said corporation is indebted in the sum of five thousand dollars, and whereas the Hudson River Baptist Association North has agreed to accept a mortgage on the aforesaid property as security for the loan of five thousand dollars, and the bond of said corporation, said bond and mortgage to contain the provisions and conditions hereinafter set forth.

"Resolved, at least two-thirds of said trustees being present and voting unanimously for this resolution, that the trustees of the North Baptist Church and Congregation of the city of Troy authorized, and they do hereby authorize the making of a mortgage upon and covering the real estate hereinbefore described and the delivery thereof to the Hudson River Baptist Association North, for the sum of five thousand dollars, and the making and delivery of a bond to accompany said mortgage ; that said bond be drawn to bind said corporation in the penal sum of ten thousand dollars, and both said bond and mortgage to be conditioned for the payment of the sum of five thousand dollars to the said Hudson River Baptist Association North, their successors or assigns, at the expiration of five years from the

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date of the making and delivery thereof, with interest thereon at the rate of five per cent. per annum payable semi-annually, which bond and mortgage shall also contain the usual interest, insurance, taxes, and assessment clauses, the said corporation to have the privilege of paying on account of said principal sum on any semi-annual interest day any sum not less than five hundred dollars, and that Otis G. Clark, the president of the Board of Trustees be authorized to make and execute said bond and mortgage and deliver the same to the Hudson River Baptist Association North, on behalf of this corporation and its trustees."

Sixth. That the market value of the remaining real property of the petitioner is twenty-five thousand dollars. That outside of the furniture in its church building, which stands upon such remaining real property, the petitioner has no personal property. That the cash value of said furniture is twenty-five hundred dollars. That the total amount of the debts and liabilities of the petitioner is five thousand dollars, and the same is unsecured.

Seventh. That the application proposed to be made of the moneys realized from such mortgage is as follows: to provide for the payment of said indebtedness of five thousand dollars.

Eighth. That at a meeting of the qualified members of the petitioner held at their meeting-house in the city of Troy, N. Y., on the 8th day of February, 1898, pursuant to a public notice given at one regular service of the church on each of the two Sundays next preceding said meeting, the object, time, and place of such meeting being distinctly stated in said notice, the members of said corporation duly consented to the mortgaging of the property of said corporation, and duly authorized and directed the trustees of the petitioner to mortgage its real estate by a resolution unanimously passed at said meeting. That a copy of the resolution evidencing such consent thereto and direction is made a part hereof and reads as follows: "Resolved, that the Board of Trustees of the North Baptist Church be authorized and empowered to raise either by giving a mortgage or by note of trustees a sum not to exceed five thousand dollars, the above amount being required to pay debts incurred in the administration of the temporal affairs of the church."

Wherefore, the petitioner demands that an order may be made granting leave to the said corporation to mortgage the real estate hereinbefore described for the sum of five thousand dollars, and authorizing and empowering said corporation to execute and deliver a bond and mortgage executed in the name of said petitioner to the Hudson River Baptist Association North, upon the real estate hereinbefore described, for that purpose, which bond and mortgage shall contain all the conditions and provisions hereinbefore set forth in the resolution of the trustees, a copy of which appears in this petition.

Dated Troy, N. Y., November 14th, 1898.

(Signatures.)

STATE OF NEW YORK, }
COUNTY OF RENSSELAER, } ss. :
CITY OF TROY. }

Otis G. Clark, Don C. Woodcock, James A. Dorrance, Halbert D.

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Hull, Philander Pollock, William F. Gurley, William A. Sherman, Stephen D. Sweet, and Edward W. Douglas, being duly sworn, depose and say, and each for himself says, that he is one of the trustees of the North Baptist Church and Congregation of the city of Troy, the petitioner making the foregoing petition; that he has heard read the foregoing petition and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Sworn to before me this } (Signatures.)
14th day of November, 1898. }
WM. C. GORDON,
Com. of Deeds, Troy, N. Y.

Petition for Leave to Sell.

To the Supreme Court of the State of New York :

The petition of the North Baptist Church and Congregation of the City of Troy respectfully shows :

First. That the petitioner is a religious Corporation, and that its corporate name is the "North Baptist Church and Congregation of the City of Troy." That it is managed by trustees. That the whole number of its trustees is nine. That the names of the trustees and their places of residence respectively are as follows :

Otis G. Clark, residing at Troy, New York; Stephen D. Sweet, residing at Troy, New York; Don C. Woodcock, residing at Troy, New York; Philander Pollock, residing at Troy, New York; William A. Sherman, residing at Troy, New York; James A. Dorrance, residing at Troy, New York; William F. Gurley, residing at Troy, New York; Halbert D. Hull, residing at Troy, New York; Edward W. Douglas, residing at Troy, New York.

That the names of its principal officers and their places of residence are as follows :

Otis G. Clark, president, residing at Troy, New York; Don C. Woodcock, secretary, residing at Troy, New York.

Second. That the business of the petitioner, and the object of its incorporation, is to enable its members to meet for divine worship and other religious observances, and the establishment and maintenance of a church for the furtherance of such objects, and that it was incorporated under and pursuant to an act of the legislature of the State of New York entitled "An Act to Provide for the Incorporation of Religious Societies, passed April 5, 1813." That its location and legal residence is in the city of Troy, New York.

Third. That the petitioner is the owner of certain real property, a description of which by metes and bounds is as follows :

(Description.)

Fourth. That the interests of the corporation will be promoted by the sale of the real property above specified, and that a concise statement of the reasons therefor is as follows : The corporation has no present use for said property, and that the same is vacant, and

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that no income is derived therefrom, and that the financial resources and condition of the petitioner are not sufficient to enable it to advantageously hold said property. That the maintenance thereof imposes a burden by reason of the taxes and insurance accruing thereon, and repairs necessarily incident thereto, and also for interest upon a mortgage for the sum of five thousand dollars, which is now an incumbrance thereon, and that by a sale thereof the petitioner will be relieved from the expense and embarrassment which now rests upon the petitioner, and the sale of said premises will enable it to pay the debt of the petitioner now evidenced by said mortgage, and furnish additional money by the use of which necessary repairs and improvements to the remaining real estate of the petitioner may be made, and the general purposes of said petitioner subserved.

Fifth. That said sale has been authorized by a vote of at least two-thirds of the trustees of the petitioner, at a meeting thereof duly called and held, and a copy of the resolution granting such authority is made a part thereof, and reads as follows :

“Whereas, the North Baptist Church and Congregation of the city of Troy has authorized and directed the trustees of said church to sell for a sum not less than seventy-five hundred dollars, upon such terms and conditions as they in their discretion shall deem advisable, subject to the approval of the court, the following described premises, viz. :

(Description.)

And, whereas, the trustees have received an offer from Edward H. Lisk, of Troy, New York, of seventy-five hundred dollars, for said property upon the following terms, viz. : Twenty-five hundred dollars to be paid down in cash on delivery of deed, said sale to be subject to a mortgage of five thousand dollars to be placed on said premises prior to or at time of purchase, and said Lisk to assume and agree to pay said mortgage as balance of said price, and to pay the State and county taxes for 1898, Now, resolved, at least two-thirds of the trustees being now present and voting unanimously therefor, that the trustees of this church authorize the sale and sell said property above described, to said Edward H. Lisk, subject to the mortgage now thereon for the said sum of seventy-five hundred dollars, payment thereof to be made as follows: Twenty-five hundred dollars to be paid in cash on the delivery of the deed of said premises, the purchaser to assume and pay the mortgage of five thousand dollars now existing on said premises, and the interest due and to grow due thereon as and for the balance of said purchase price, said Lisk to pay the State and county taxes levied on said premises for 1898, and that application be made to the court in the proper manner for permission to make said sale, and that the cash received on said sale be applied to the repairs and improvement of the house of worship, and for the general purposes of said church, and that the president of this corporation be, and he hereby is, authorized to make and execute the proper deed of conveyance of said premises in the name of, and on behalf of this corporation, in case the court shall grant leave to sell the same.

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Sixth. That the market value of the remaining real property of the petitioner is twenty-five thousand dollars. That outside of the furniture in its church building, which stands upon such remaining real property, the petitioner has no personal property. That the cash value of said furniture is twenty-five hundred dollars. That the total amount of the debts and liabilities of the petitioner is five thousand dollars, and the same is secured by a bond and mortgage, heretofore given by petitioner to the Hudson River Baptist Association North, which mortgage is a lien and incumbrance upon the property hereinbefore described, which mortgage was recorded in the Rensselaer County clerk's office on the fifteenth day of November, 1898, and which bond and mortgage are now owned by the Hudson River Baptist Association North.

Seventh. That the application proposed to be made of the moneys realized from such sale is as follows : To provide for the ultimate payment of said mortgage and the debt represented thereby, by the agreement of the purchaser to assume and pay said mortgage, and the interest due and to grow due thereon as a part of the purchase price of said premises, and the balance of the moneys realized from such sale it is proposed to apply on account of repairs and improvements to the remaining church property of the petitioner, which repairs and improvements will be necessary to be made in the near future, and if any balance remains thereafter to apply the same for the general purposes of the petitioner.

Eighth. That Edward H. Lisk, of Troy, N. Y., has agreed to purchase said property hereinbefore described, and to pay the petitioner therefor, the sum of seventy-five hundred dollars, twenty-five hundred dollars to be paid in cash upon the delivery of the deed of said premises to said Lisk, and the further agreement on the part of said Lisk to assume and pay the mortgage of five thousand dollars to be placed upon said premises prior to or at the time of such purchase, and the debt evidenced thereby, and the interest due and to grow due thereon as the balance of such purchase price. Said Lisk also as part of his undertaking agrees to pay the State and county taxes levied on said premises for the year 1898.

Ninth. That at a meeting of the qualified members of the petitioner held at their meeting-house in the city of Troy, N. Y., pursuant to a public notice given at one regular service of the church on each of the two Sundays next preceding said meeting, the object, time, and place of such meeting being distinctly stated in said notice, the members of said corporation duly consented to such sale, and duly authorized and directed the trustees of the petitioner to sell the real estate above described. That a copy of the resolution evidencing such consent, authority, and direction is made a part thereof and reads as follows :

(Here insert copy.)

Wherefore, petitioner demands leave to sell the real estate hereinbefore described to Edward H. Lisk, of Troy, N. Y., subject to the mortgage of five thousand dollars now thereon, and authority to make, execute, and deliver all conveyances necessary to pass a proper title thereto, for the sum of seventy-five hundred dollars.

Art. 2. Petition and Contents.

twenty-five hundred dollars of said purchase price to be paid in cash on the delivery of the deed, and the agreement of said Lisk to assume and his agreement to pay the mortgage which is now a lien and incumbrance on said premises, and the debt of five thousand dollars evidenced thereby, and the interest due and to grow due thereon, as and for the balance of the purchase price of said premises, and his further agreement to pay the State and county taxes levied on said premises for the year 1898, and authority to apply the proceeds of said sale in the manner hereinbefore set forth.

Dated Troy, N. Y., November 16, 1898.

(Signatures and verification.)

It was held in *Wyatt v. Benson*, 23 Barb. 327, apparently upon the authority of *People v. Fulston*, 11 N. Y. 94, and *Robertson v. Bullions*, id. 243, that the application must be made by and in the name of the corporation, and that the court had no power to grant an order of sale upon the application of the trustees or otherwise than upon the application of the corporation; but in *The Madison Avenue Baptist Church v. The Baptist Church in Oliver Street*, 46 N. Y. 131, it is held that, under the act to provide for the incorporation of religious societies, the trustees of such a corporation are authorized to act in its behalf in taking the steps required for effecting a sale of its real estate, and their acts are binding upon it, although it does not appear that they had the express sanction or authority of a majority of the corporation. The same case is reported in 73 N. Y. 82, on a subsequent appeal. It is said in *Re St. George's M. E. Church*, 21 Week. Dig. 81, that a meeting of the corporation and vote of approval is not necessary to a valid sale, citing cases above, and 13 Abb. 414; *Matter of St. Ann's Church*, 23 How. 285. It is, however, usual to have a vote of the corporation. *Matter of Second Baptist Church in Canaan*, 20 How. 324. The consent of all the pewholders as such is not necessary to make out a case for leave for granting the trustees leave to sell a church edifice. *Matter of Brick Presbyterian Church*, 3 Edw. Ch. 155; *Matter of the Reformed Dutch Church*, 16 Barb. 237.

The application is to be made at the court at Special Term, or the county court, which is always in session for that purpose. It is by petition, and while it is not necessary to state that the corporation has voted in favor of a sale, as was held in *Wyatt v. Benson*, 23 Barb. 327, yet it is usual to make such statement in case that is the fact. *Matter of Second Baptist Society*, 20 How.

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324; see 23 id. 285, 18 N. Y. 395, 46 id. 131, *supra*. A contract may be entered into before the order of sale is made, and it will be sufficient if the authority is obtained before the deed is made. *Congregation Beth Elohim v. Central Presbyterian Society*, 10 Abb. (N. S.) 484; *Madison Avenue Baptist Church v. Baptist Church in Oliver Street*, 30 How. 455. But it is not absolutely necessary for the petitioners to show that they have agreed with a purchaser. An order may be made directing a sale at a price not less than a sum named, and in case no purchaser is found at such price, sale cannot be had under the order. *Matter of the Brick Presbyterian Church*, 3 Edw. Ch. 155. A corporation has power to contract for sale before order of court is granted, subject to approval of the court. It is not necessary or desirable that the sanction of the court should precede the negotiation. *Bowen v. First Presbyterian Congregation*, 6 Bosw. 243.

The proceedings upon the application by a religious corporation to mortgage its real estate are regulated by this title, and the petition must conform to the requirements of § 3391. *Matter of Church of the Messiah*, 25 N. C. 354, 12 Supp. 489. Query as to whether the consent of the presbytery was necessary to the sale of the real property of the Presbyterian church under Laws 1875, chapter 79, Laws 1876, chapter 110. It was held, however, that where there had been consent of the presbytery to such sale, provided a majority of the congregation should so decide in public meeting assembled, followed by a regular meeting called for the trustees at which, of 137 members entitled to vote, 87 voted, and of these 66 voted in favor of the sale, and 24 of those who did not vote signed the paper approving the sale; that under these circumstances the conditions imposed on the corporation were complied with and a sale was authorized. *Held*, also, that in the absence of proof that any lawful vote was excluded, or any unlawful vote admitted, the want of a proper register did not invalidate the vote taken. *Matter of First Presbyterian Society of Buffalo*, 106 N. Y. 251. Under Laws 1813, chapter 60, it is competent for the court to authorize a sale of the property of a religious corporation, for the purpose of paying its debts, as distinguished from a sale or transfer for the purpose of consolidation and practical dissolution. *Lynch v. Pfeiffer*, 110 N. Y. 33, affirming, 38 Hun, 603.

Art. 3. Hearing ; Order ; When Notice Required.

ARTICLE III.

HEARING ; ORDER ; WHEN NOTICE REQUIRED.

§§ 3392, 3393, 3394, 3395.

§ 3392. Hearing of application ; notice ; reference to take proofs.

Upon presentation of the petition, the court may immediately proceed to hear the application, or it may, in its discretion, direct that notice of the application shall be given to any person interested therein, as a member, stockholder, officer, or creditor of the corporation or association, or otherwise, in which case the application shall be heard at the time and place specified in such notice, and the court may in any case appoint a referee to take the proofs and report the same to the court, with his opinion thereon.

§ 3393. Order ; when application for, may be opposed.

Upon the hearing of the application, if it shall appear, to the satisfaction of the court, that the interests of the corporation or association will be promoted thereby, an order may be granted authorizing it to sell, mortgage, or lease the real property described in the petition, or any part thereof, for such sum, and upon such terms as the court may prescribe, and directing what disposition shall be made of the proceeds of such sale, mortgage, or lease.

Any person, whose interests may be affected by the proceeding, may appear upon the hearing and show cause why the application should not be granted.

§ 3394. Insolvent corporation or association ; notice to creditors.

If the corporation or association is insolvent, or its property and assets are insufficient to fully liquidate its debts and liabilities, the application shall not be granted, unless all the creditors of the corporation have been served with a notice of the time and place at which the application will be heard.

§ 3395. Service of notices.

Service of notices, provided for in this title, may be made either personally or, in case of absence, by leaving the same at the place of residence of the person to be served, with some person of mature age and discretion, at least eight days before the hearing of the application, or by mailing the same, duly enveloped and addressed and postage paid, at least sixteen days before such hearing.

Precedent for Order. (25 Abb. N. C.)

(Title and Caption.)

Ordered, that the said trustees be, and they are hereby authorized, to mortgage said real estate for the sum of twenty-five thousand dollars (\$25,000), and to execute and deliver a mortgage therefor in the usual form ; said real estate is described in said petition as follows :

(Description.)

It is further ordered, that the proceeds of said mortgage loan be applied by said trustees as follows, viz. : To complete the chapel now being erected on said premises, and to fulfil the terms of the petitioners' contract for the construction of said chapel.

Art. 3. Hearing ; Order ; When Notice Required.

Order to Mortgage.

At a Special and Trial Term of the Supreme Court, held in and for the county of Albany, at the city hall in the city of Albany, in the county of Albany and State of New York, on the 14th day of November, 1898 :

Present :—Hon. Alphonso T. Clearwater, *Justice*.

In the Matter of the Application of the Trustees of the North Baptist Church and congregation of the City of Troy, for leave to Mortgage its Real Estate.

Upon reading and filing the petition of the North Baptist Church and Congregation of the city of Troy, for leave to mortgage certain of its real estate, which petition was dated, duly verified, and signed on this 14th day of November, 1898, by Otis G. Clark, Don C. Woodcock, James A. Dorrance, William F. Gurley, Philander Pollock, Halbert D. Hull, William A. Sherman, Stephen D. Sweet, and Edward W. Douglas, comprising the whole number of the trustees of the petitioning corporation, from which petition it satisfactorily appears that the members of the corporation have duly consented to the mortgaging of its real estate, and that such mortgage has been authorized by a vote of at least two-thirds of the trustees of the corporation at a meeting thereof duly called and held, and that the interest of the corporation will be promoted by the mortgaging of the real property specified in the petition, and that said petition complies with the provisions required by law relating to the application to mortgage the real estate of a corporation.

Now, after due deliberation upon the matters set forth in said petition, and after hearing Edward W. Douglas, of counsel for the petitioning corporation, and upon his motion, it is

Ordered, that the prayer of said petitioner be granted, and that the petitioner be and it hereby is given leave to mortgage the real estate described in said petition for the sum of five thousand dollars, and it is further

Ordered, that the petitioner execute, duly acknowledge, and deliver to the Hudson River Baptist Association North, the corporation named in said petition, a bond and mortgage, which mortgage shall cover the real estate owned by said corporation described in the petition, the petitioner to be bound in said bond in the sum of ten thousand dollars, and both said bond and mortgage to be conditioned for the payment of the sum of five thousand dollars to the said The Hudson River Baptist Association North, their successors or assigns, at the expiration of five years from the date of said bond and mortgage, with interest thereon at the rate of five per cent. per annum, payable semi-annually, with the usual interest, insurance, tax, and assessment clauses therein, the petitioner to have the privilege of paying on account of said principal sum on any semi-annual interest day, any sum not less than five hundred dollars, and it is further

Art. 3. Hearing ; Order ; When Notice Required.

Ordered, that the proceeds of said bond and mortgage shall be applied for the purposes mentioned in the petition.

Enter in Rensselaer County.

A. T. CLEARWATER,
Jus. Sup. Court.

Order to Sell.

At a Special Term of the Supreme Court of the State of New York, held at the city hall in the city of Albany, N. Y., on the 16th day of November, 1898 :

Present :—Hon. A. T. Clearwater, *Justice*.

In the Matter of the Application of the Trustees of the North Baptist Church and Congregation of the City of Troy for leave to Sell its Real Estate.

Upon reading and filing the petition of the North Baptist Church and Congregation of the city of Troy, for leave to sell certain of its real estate, which petition was dated and duly verified and signed on this 16th day of November, 1898, by Otis G. Clark, William F. Gurley, Philander Pollock, James A. Dorrance, Stephen D. Sweet, Hulbert D. Hull, William A. Sherman, Don C. Woodcock, and Edward W. Douglas, comprising the whole number of the trustees of the petitioning corporation, from which it satisfactorily appears that the members of the corporation have duly consented to the sale of the real estate in said petition mentioned, and that such sale has been authorized by a vote of at least two-thirds of the trustees of the corporation at a meeting thereof duly called and held, and that the interests of the corporation will be promoted by the sale of the real property specified in the petition, and that said petition complies with the provisions required by law relating to the application to sell the real estate of a corporation,

Now, after due deliberation upon the matters set forth in the petition, and after hearing Edward W. Douglas, of counsel for the petitioning corporation, and upon his motion it is

Ordered, that the prayer of said petitioner be granted, and that the petitioner be and it hereby is given leave to sell the real estate described in said petition.

It is further ordered, that the petitioner be and it hereby is authorized and empowered to sell said real estate to Edward H. Lisk, of Troy, N. Y., subject to the mortgage heretofore given to the Hudson River Baptist Association North by the petitioner, which mortgage was recorded in Rensselaer County clerk's office on the 15th day of November, 1898, and is now an existing lien on said premises, and that said sale be made in the following manner and upon the following conditions, viz : the purchase price shall be seventy-five hundred dollars, the purchaser to pay twenty-five hundred dollars thereof in cash, and assume and agree to pay the mortgage heretofore given by the petitioner to the Hudson River

 Art. 3. Hearing ; Order ; When Notice Required.

Baptist Association North, recorded in Rensselaer County clerk's office November 15th, 1898, now an existing incumbrance and lien upon said premises, and the debt evidenced thereby, together with the interest due and to grow due thereon, as and for the balance of the purchase price of said premises, and pay the State and county taxes levied on said premises for the year 1898, and that upon the compliance of said purchaser with these conditions the petitioner is authorized to make, execute, and deliver to said purchaser a proper and sufficient deed of said premises.

It is further ordered, that the petitioner apply the proceeds of said sale in the manner and for the purposes set forth in its said petition.

Enter in Rensselaer County.

A. T. CLEARWATER,
Jus. Sup. Court.

Deed with Recitals.

This indenture, made this 16th day of November, in the year one thousand eight hundred and ninety-eight, between the North Baptist Church and Congregation of the City of Troy, a religious corporation duly incorporated under and by virtue of the laws of the State of New York, located in the city of Troy, Rensselaer County, New York, party of the first party, and Edward H. Lisk, of the same place, party of the second part.

Whereas, the party of the first part, at a meeting of its qualified members, held at their meeting-house in the city of Troy, N. Y., pursuant to a public notice given at one regular service of the church at each of the two Sundays next preceding said meeting, the object, time, and place of such meeting being distinctly stated in said notice, the members of said party of the first part duly consented to the sale of the real estate hereinafter described, and duly authorized and directed its trustees to make application to the court to sell the same ; and, whereas, the said trustees have authorized a sale of said real estate by a vote of at least two-thirds of its trustees, at a meeting thereof, duly called and held ; and, whereas, upon the petition of said trustees pursuant to such authorization, an order of the Supreme Court was duly made permitting the party of the first part to sell said real estate.

Now this indenture witnesseth : That the said party of the first part, pursuant to the provisions of said order, and in consideration of the sum of seventy-five hundred dollars, lawful money of the United States, paid by the party of the second part, does hereby grant and release unto the said party of the second part, his heirs and assigns forever, all that tract or parcel of land, situate in the city of Troy, county of Rensselaer, and State of New York, and known as all that part of lots numbers eight hundred and seventy-two (872), and eight hundred and seventy-one (871), in said city of Troy, bounded and described as follows : (Description.) This conveyance is made subject to a mortgage for five thousand dollars, with the interest due and to grow due thereon, covering the premises herein described, made and executed by the North Baptist Church and Congregation of the city

Art. 3. Hearing ; Order ; When Notice Required.

of Troy to the Hudson River Baptist Association North, dated the 14th day of November, 1898, and recorded in Rensselaer County clerk's office on the 15th day of November, 1898, which mortgage, and the bond to secure which said mortgage was given, the said party of the second part hereby assumes and agrees to pay as part of the consideration and purchase price of the premises above described, and the said party of the second part also assumes and agrees to pay the State and county taxes levied or to be levied on said premises for the year 1898, together with the appurtenances and all the estate and rights of the party of the first part in and to said premises. To have and to hold the above granted premises unto the said party of the second part, his heirs and assigns forever, subject to the mortgage for five thousand dollars, with the interest due and to grow due thereon, and the State and county taxes for the year 1898, above mentioned.

And the said The North Baptist Church and Congregation of the city of Troy does hereby covenant with the said party of the second part, that the said party of the first part has not done or suffered anything whereby the above described premises have been incumbered in any way whatever, except the giving of the mortgage for five thousand dollars to the Hudson River Baptist Association North, which the said party of the second part has herein assumed and agreed to pay.

In witness whereof, the said The North Baptist Church and Congregation of the city of Troy has caused these presents to be signed, sealed, executed, acknowledged, and delivered in its name and behalf by Otis G. Clark, its president, and the said party of the second part has hereunto set his hand and seal this 16th day of November, 1898.

In presence of
WM. C. GORDON.

THE NORTH BAPTIST CHURCH
AND CONGREGATION OF THE
CITY OF TROY. [L. s.]
By OTIS G. CLARK, as President.
EDWARD H. LISK. [L. s.]

STATE OF NEW YORK, }
COUNTY OF RENSSELAER, } ss. :
CITY OF TROY, }

On this 16th day of November, 1898, before me personally came Otis G. Clarke, to me known, who being by me duly sworn did depose and say that he resided in the city of Troy, Rensselaer County, New York ; that he is the president of the North Baptist Church and Congregation of the city of Troy, the corporation described in and which executed the above instrument ; that the said corporation has no corporate seal, and that he signed his name thereto by order of the board of trustees of said corporation.

WM. C. GORDON,
Com. of Deeds, Troy, N. Y.

STATE OF NEW YORK, }
COUNTY OF RENSSELAER, } ss. :
CITY OF TROY, }

On this 16th day of November, 1898, before me, the subscriber,

Art. 3. Hearing ; Order ; When Notice Required.

personally came Edward H. Lisk, to me known and known to me to be the same person described in and who executed the foregoing instrument, and acknowledged that he executed the same.

WM. C. GORDON,
Com. of Deeds, Troy, N. Y.

The sale may be made by the trustees, or by an officer appointed by the court. *De Ruyter v. St. Peter's Church*, 3 N. Y. 240. In case of the sale of the property of a religious corporation, with the assent of the court, the avails are not to be distributed among the original contributors and pewholders, but they are to be applied to such uses as the corporation, with the consent and approval of the court, shall conceive to be most for the interests of the society. It is the right of a church corporation to designate the object for which the moneys arising from a sale of its real estate shall be used. If the object thus designated meets the approval of the court, the appropriation will be made. If not, the money must be retained by the corporation until it can make such an application of it as will meet with the consent and approbation of the court. The court may withhold its assent, but it cannot direct the appropriation of the moneys in any specified manner. *Matter of Reformed Church of Saugerties*, 16 Barb. 237. The trustees have no right or authority to distribute the property of the society among the individual members, or any class of them, nor can it be conferred by a vote of the majority of the members and the order of the court. The court cannot approve of any plan for the distribution of the proceeds of the sale of the real estate, which does not regard the interest of the society as an organization to continue for the purposes of its creation. Where it appears from the application that the sale is sought for the purpose of distributing the proceeds among the pewholders, the court has no jurisdiction to grant the application, and its order is inoperative. *Wheaton v. Gates*, 18 N. Y. 395, cited, *Madison Av. Baptist Church v. Baptist Church in Oliver St.*, 73 id. 140. It seems that the only way in which a religious corporation can divide its real estate, and vest a portion thereof in a part of its congregation set off from the parent organization, is by legislative enactment. *Reformed Church v. Schoolcraft*, 5 Lans. 210, affirmed, 65 N. Y. 135.

The order permitting the conveyance of real property by a religious corporation constitutes no estoppel in favor of a grantee

 Art. 3. Hearing ; Order ; When Notice Required.

who has parted with no consideration. *St. James' Church v. Church of the Redeemer*, 45 Barb. 356. The trustees of a religious corporation, making application to the court for leave to sell or mortgage its property, are not general but special agents, and if they act without authority the corporation is not estopped by the proceedings. *Moore v. Rector, etc., St. Thomas*, 4 Abb. N. C. 51. The trustees, however, in carrying out a contract of sale, have incidental power to agree to an extension of time for delivering the deed. *Congregation Beth Elohim v. Central Presbyterian Church*, 10 Abb. (N. S.) 484. Where a religious corporation sold real estate, under an order of the court, to a *bona fide* purchaser, and received from him the value of the property, *held*, that a member of the corporation could not set up against the sale that by reason of irregularities in the proceedings the corporation did not give a valid title. *Watkins v. Wilcox*, 4 Hun, 220, affirmed, 66 N. Y. 654, on other points.

Plaintiff and defendant, religious corporations, united, the former conveying all its property to the latter, which assumed all the debts and took the corporate name ; defendant paid the debts, took possession of the property under a sale made by order of the court, and maintained religious services. In a suit for recovery of its real property by plaintiff, it was held that these facts did not show a sale, and, therefore, that the court had no jurisdiction to order the sale ; that plaintiff could redeem, but only on repayment to defendant the sums advanced on former indebtedness, with interest from the time defendants ceased to possess the property, and such other terms as were equitable, as set out in the opinion. A conveyance *ultra vires*, by a religious corporation, of its real estate cannot be held valid because it has executed and delivered its deed and received consideration therefor. *Madison Av. Baptist Church v. Baptist Church Oliver St.*, 73 N. Y. 82. A sale of its real estate by a religious corporation subject to the payment of all liens thereon and all debts of the society, including the floating debt, *held*, valid, the application for leave to the Supreme Court to make such sale having shown a necessity for such disposition of the property, and that it was for the best interests of the society. *Lynch v. Pfeiffer*, 38 Hun, 603.

The order granting leave to mortgage the real property of a religious corporation will direct the application of the proceeds. *Matter of Church of Messiah*, 25 Abb. N. C. 354, 12 Supp. 489.

Art. 4. Power of Court and When Act Took Effect.

ARTICLE IV.

POWER OF COURT AND WHEN ACT TOOK EFFECT.

§§ 3396, 3397.

§ 3396. Power of court to make necessary orders.

In all applications made under this title, where the mode or manner of conducting any or all of the proceedings thereon are not expressly provided for, the court before whom such application may be pending shall have the power to make all the necessary orders and give the proper directions to carry into effect the object and intent of this title, or of any act authorizing the sale of corporate real property, and the practice in such cases shall conform, as near as may be, to the ordinary practice in such court.

§ 3397. When act takes effect.

This title shall take effect May first, one thousand eight hundred and ninety, and shall not affect any proceeding previously commenced.

CHAPTER XXVIII.

ADMISSION OF ATTORNEYS.

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ARTICLE I.

FEATURES OF THE PROCEEDING.

The Constitution gives to every qualified applicant for admission to the bar the right to admission, which is a substantial right. His application is a special proceeding, for which remedy under an order denying the right of admission is appealable to the Court of Appeals. *Matter of the Application of Cooper*, 22 N. Y. 67. More fully as *Matter of Graduates*, 11 Abb. 301. This case contains an interesting discussion of the power of the courts with respect to the admission of attorneys. At common law, the courts had nothing to do with the admission of attorneys and counsellors to practice; the power is conferred by the Constitution.

The power of the court to admit or to remove attorneys is given by statute, and in either case the proceeding is a special one. *In re Cooper*, 22 N. Y. 67; *In re Percy*, 36 N. Y. 651; *In the Matter of an Attorney*, 83 N. Y. 164. For a considerable period after the adoption of the Constitution of 1846, this matter was entirely in the hands of the General Terms in the respective dis-

Art. 1. Features of the Proceedings.

tricts and departments. The Court of Appeals, however, several years ago, in deference to the sentiment of the bar upon the subject, adopted a set of rules regulating the matter of admissions and prescribing certain preliminary qualifications. These rules have been amended from time to time, and, as now numbered and arranged, were adopted so as to take effect January 1, 1895.

The adoption of the rules to take effect in 1895 followed the amendment to § 56 of the Code by chapter 760 of the Laws of 1894, which provided for a stated number of law examiners, as is fully set forth in that section as incorporated in this chapter. This board entered upon its duties on the first of January, 1896, and its action is controlled by such provisions of the Code as relate to the admission of attorneys by the rules of the Court of Appeals upon that subject, together with a single rule of the Supreme Court, and by rules adopted by the board of law examiners for their own guidance.

The preliminary requirements as fixed and determined by the board of regents from those other than graduates of colleges, recognized by such board, are very full, minute, and explicit, and are furnished by the board upon application.

A very full and complete treatise upon the entire subject is contained in Smith's Court of Appeals Practice (a new edition of which has just been issued), edited by the State Reporter, whose great familiarity with the subject has enabled him to collate the statutes, rules, and authorities upon the subject with appropriate forms, and it does not seem that it would serve any useful purpose to go into these details, since it would also necessitate a statement with reference to the regulations of the regents of the university upon this subject, also contained in the work referred to.

In order to call the attention of the student, as well as the practitioner, to the requirements for entering upon and prosecuting the study of the law, the statutes and rules of the Court of Appeals, of the Supreme Court, and of the State Board of Examiners are here inserted for convenience of reference, and this is done, since in very many instances it is found that practitioners and students alike neglect preliminary requirements, and that it is very frequently only after a considerable period of time spent in the study of the law, that a student discovers that he has omitted some of the matters necessary to entitle him to apply for admission.

 Art. 2. Code Provisions Relative to Admission of Attorneys.

ARTICLE II.

CODE PROVISIONS RELATIVE TO ADMISSION OF ATTORNEYS.

§§ 56, 57, 58, 59, 193.

§ 56. [Am'd, 1895.] Examination and admission of attorneys.

A citizen of the State, of full age, applying to be admitted to practice as an attorney or counsellor in the courts of record of the State, must be examined and licensed to practice as herein prescribed. A State board of law examiners is hereby created, to consist of three members of the bar, of at least ten years' standing, who shall be appointed from time to time, by the Court of Appeals, and shall hold office as a member of such board for a term of three years, except under the first appointment which shall be for terms of one, two, and three years respectively, until the appointment of his successor. Such court shall prescribe rules providing for a uniform system of examination which shall govern such board of law examiners in the performance of its duties and shall fix the compensation of its members. There shall be examinations of all persons applying for admission to practice as attorneys and counsellors-at-law at least twice in each year in each judicial department and at such other times and places as the Court of Appeals may direct. Every person applying for such examination shall pay such fee, not to exceed fifteen dollars, as may be fixed by the Court of Appeals as necessary to cover the cost of such examination. On payment of one examination fee the applicant shall be entitled to the privilege of not exceeding three examinations. Such board shall certify to the appellate division of the Supreme Court of the department in which each candidate has resided for the past six months every person who shall pass the examination, provided such person shall have in other respects complied with the rules regulating admission to practice as attorneys and counsellors, which fact shall be determined by said board before examination. Upon such certificate, if the appellate division of the Supreme Court shall find such person is of good moral character, it shall enter an order licensing and admitting him to practice as an attorney and counsellor in all courts of the State. Race or sex shall constitute no cause for refusing any person examination or admission to practice. Any fraudulent act or representation by an applicant in connection with his application or admission shall be sufficient cause for the revocation of his license by the appellate division of the Supreme Court granting the same. Such board shall render, during the month of January, an annual account of all their receipts and disbursements to the Court of Appeals. The Court of Appeals may make such provisions as it shall deem proper for admission of persons who have been admitted to practice in other States or countries.

L. 1895, ch. 946.

§ 57. [Am'd, 1895.] Rules, how changed.

The rules established by the Court of Appeals, touching the admission of attorneys and counsellors to practice in the courts of record of the State, shall not be changed or amended, except by a majority of the judges of that court. A copy of each amendment to such rules must, within five days after it is adopted, be filed in the office of the secretary of State; who must transmit a printed copy thereof to the clerk of each county, and to the presiding justice of the appellate division of the Supreme Court, in each judicial department, and also cause the same to be published in the next ensuing volume of the session laws.

L. 1895, ch. 946.

§ 58. [Am'd, 1893.] Exemptions to graduates of certain law schools.

Nothing contained in the last two sections prevents the Court of Appeals from dis-

 Art. 3. Rules of Court of Appeals and Supreme Court on the Subject.

pensing, in the rules established by it, with the whole or any part of the stated period of clerkship, required from an applicant, or with an examination, where the applicant is a graduate of the Albany Law School, the law department of Union University, or of the law department of the University of the city of New York, or of the law school of Columbia College, or of the law department of Hamilton College, or of the law school of the University of Buffalo, and the New York Law School, and produces his diploma upon his application for admission.

L. 1893, ch. 163.

§ 59. [Am'd 1895.] Attorney's oath of office and certificate of admission.

Each person, admitted as prescribed in the last three sections, must, upon his admission, take the constitutional oath of office in open court, and subscribe the same in a roll or book, to be kept in the office of the clerk of the appellate division of the Supreme Court for that purpose. The clerk, upon the payment of the fees allowed by law, must deliver to the person admitted, a certificate under his hand and official seal, stating that such person has been so admitted, and that he has taken and subscribed the constitutional oath of office as prescribed in this section.

L. 1895, ch. 946.

§ 193. Court may make rules.

The court may from time to time make, alter, and amend, rules, not inconsistent with the constitution or statutes of the State, regulating the practice and proceedings in the court, and the admission of attorneys and counsellors-at-law, to practice in all the courts of record of the State.

L. 1870, ch. 203, § 2, and L. 1871, ch. 486, § 1.

ARTICLE III.

RULES OF COURT OF APPEALS AND SUPREME COURT ON THE SUBJECT. Rules 1-10, Court of Appeals. Rule 1, Supreme Court.

Rule 1. Admission and license.

No person shall be admitted to practice as an attorney or counsellor in any court of record in this State, without a regular admission to the bar and license to practice granted by an appellate division of the Supreme Court.

Rule 2. Admission after practicing three years in another State or country, etc.

Any person who has been admitted to practice, and has practiced three years as an attorney and counsellor in the highest court of law in another State, and any person who has thus practiced in another country, or who, being an American citizen and domiciled in a foreign country, has received such diploma or decree therein as would have entitled him, if a citizen of such foreign country, to practice law in its courts, may, in the discretion of an appellate division of the Supreme Court, be admitted and licensed without an examination. But he must possess the other qualifications required by these rules, and must produce a letter of recommendation from one of the judges of the highest court of law of such other State or country, or furnish other satisfactory evidence of character and qualifications.

Rule 3. Prerequisites to admission on examinations.

All other persons may be admitted and licensed upon producing and filing with the

Art. 3. Rules of Court of Appeals and Supreme Court on the Subject.

court a certificate of the State board of law examiners that the applicant has satisfactorily passed the examination prescribed by these rules and has complied with their provisions; and upon producing and filing with the court evidence that such applicant is a person of good moral character, which may be shown by the certificate of the attorney with whom he has passed his clerkship, or by some attorney in the town or city where he resides, but such certificate shall not be conclusive, and the court may make further examination and inquiry.

Rule 4. Prerequisites to examination by State board of law examiners; periods of law study; admission in another State or country.

To entitle an applicant to an examination as an attorney and counsellor, he must prove by his own affidavit, to the satisfaction of the State board of law examiners:

First. That he is a citizen of the United States, twenty-one years of age, stating his age, and a resident of the State, and that he has not been examined for admission for practice and been refused admission and license within three months immediately preceding.

Second. That he has studied law in the manner and according to the conditions hereinafter prescribed for a period of three years, and that he is the same person mentioned in his annexed preliminary papers, except that if the applicant be a graduate of any college or university, his period of study may be two years instead of three; and except also that persons who have been admitted as attorneys in the highest court of original jurisdiction of another State or country, and have remained therein as practicing attorneys for at least one year, may be admitted to such examination after a period of law study of one year within this State.

Rule 5. Study of law; regents' examination and certificate; vacations; clerkship certificate.

Applicants for examination shall be deemed to have studied law within the meaning of these rules only when they have complied with the following terms and conditions, viz.:

1. The provisions for requisite periods of study must be fulfilled by serving a regular clerkship in the office of a practicing attorney of the Supreme Court in this State after the age of eighteen years; or after such age, by attending an incorporated law school, or a law school connected with an incorporated college or university having a law department organized with competent instructors and professors, in which instruction is regularly given; or after such age, by pursuing such course of study, in part by attendance at such law school, and in part by serving such clerkship.

2. If the applicant be a graduate of a college or university, he must have pursued the prescribed course of study after his graduation; and if he be a person admitted to the bar of another State or country, he must have pursued his prescribed period of study after having remained an attorney in such other State or country for the period of one year.

3. Applicants who are not graduates of a college or university, or members of the bar as above prescribed, shall, before entering upon the clerkship or attendance at a law school herein prescribed, or within one year thereafter, have passed an examination conducted under the authority and in accordance with the ordinances and rules of the University of the State of New York, in English composition, advanced English, first year Latin, arithmetic, algebra, geometry, United States and English history, civics, and economics, or in their substantial equivalents as defined by the rules of the University, and shall have filed a certificate of such fact signed by the secretary of the University with the clerk of the Court of Appeals, whose duty it

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shall be to return to the person named therein a certified copy of the same showing the date of such filing. The regents may accept as the equivalent of and substitute for the examination in this rule prescribed either, first, a certificate properly authenticated, of having successfully completed a full year's course of study in any college or university; second, a certificate properly authenticated of having satisfactorily completed a three years' course of study in any institution registered by the regents as maintaining a satisfactory academic standard; or, third, a regents' diploma. The regents' certificate above prescribed shall be deemed to take effect as of the date of the completion of the regents' examination, as the same shall appear upon said certificate.

4. Attendance on a law school during a school year of not less than eight months in any year shall be deemed a year's attendance under this rule; and in computing the period of clerkship a vacation actually taken not exceeding two months in each year shall be allowed as part of such year.

5. It shall be the duty of attorneys, with whom a clerkship shall be commenced, to file a certificate of the same in the office of the clerk of the Court of Appeals, which certificate shall in each case state the date of the beginning of the period of clerkship, and such period shall be deemed to commence at the time of such filing, and shall be computed by the calendar year.

6. The same period of time shall not be duplicated for different purposes, except that a student attending a law school as herein provided, and who, during the vacations of such school, not exceeding three months in any one year, shall pursue his studies in the office of a practicing attorney, shall be allowed to count the time so occupied during such vacation or vacations as part of the clerkship in a law office specified in these rules.

Rule 6. Proof of compliance with preliminary requirements.

The State board of law examiners, before admitting an applicant to an examination, shall require proof that the preliminary conditions prescribed by these rules have been fulfilled; which proof shall be made as follows, viz.:

1. That the applicant is a college graduate, by the production of his diploma or certificate of graduation under the seal of the college.

2. That he has been admitted to the bar of another State or country by the production of his license or certificate executed by the proper authorities.

3. That he has served a regular clerkship, in the office of a practicing attorney of the Supreme Court of this State, after the age of eighteen years, by producing and filing with the board a certified copy of the attorney's certificate as filed in the office of the clerk of the Court of Appeals, and producing and filing an affidavit of the attorney or attorneys with whom such clerkship was served, showing the actual service of such a clerkship, the continuance and end thereof, and that not more than two months vacation was taken in any one year.

4. The time of study allowed in a law school must be proved by the certificate of the teacher or president of the faculty under whose instructions the person has studied, under the seal of the school, if such there be, in addition to the affidavit of the applicant, which must also state the age at which the applicant began his attendance at such law school, which proofs must be satisfactory to the board of examiners.

5. That the applicant has passed the regents' examination or its equivalent, must be proved by the production of a certified copy of the regents' certificate filed in the office of the clerk of the Court of Appeals, as hereinbefore provided.

6. When it satisfactorily appears that any diploma, affidavit, or certificate required to be produced has been lost or destroyed, without the fault of the applicant, or has

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been unjustly refused or withheld, or by the death or absence of the person or officer who should have made it cannot be obtained, the board of law examiners may accept such other proof of the requisite facts as they shall deem sufficient.

7. A law student whose clerkship or attendance at a law school has already begun as shown by the record of the Court of Appeals, or by any incorporated law school, or law school established in connection with any college or university, may, at its option, file or produce, instead of the proofs required by these rules, those required by the rules of the Court of Appeals adopted October 28, 1892.

Rule 7. Filing certificates nunc pro tunc; certain regents' certificates validated.

When the filing of a certificate, as required by these rules, has been omitted by excusable mistake, or without fault, the court may order such filing as of the proper date. All certificates heretofore issued to law students by the board of regents, and founded upon equivalents instead of an actual examination, are validated and made effectual, and may be accepted as sufficient by the board of law examiners.

Rule 8. State board of law examiners.

The State board of law examiners shall be paid as compensation, each the sum of two thousand dollars per year, and in addition such further sum as the court may direct, and an annual sum not exceeding two thousand dollars per year shall be allowed for necessary disbursements of the board. Every applicant for examination shall pay to the examiners a fee of fifteen dollars, which shall be applied upon the compensation and allowance above provided, and any surplus thereafter remaining shall be held by the treasurer of the State board of law examiners and deposited in some bank in good standing, in the city of Albany, to his credit and subject to his draft as such treasurer when approved by the chief judge. The examinations held by such State board of examiners may be conducted by oral or written questions and answers, or partly oral and partly written, but shall be as nearly uniform in the knowledge and capacity which they shall require, as is reasonably possible. An applicant who has failed to pass one examination cannot again be examined, until at least three months after such failure. (As amended Dec. 1, 1897.)

Rule 9. Times and places of holding examinations—Department.

The State board of law examiners shall hold at least one examination in each judicial department, at the city or village in which the appellate divisions of the Supreme Court are held, between the tenth day of June and the twentieth day of July in each year, and one examination in each department at the places above named, during the month of January in each year. They may appoint other times and places for additional examinations, and may hold some or all of such additional examinations concurrently with the regular or annual examinations of any law school in this State, and any applicant entitled to be examined may be so examined in any department, whether a resident therein or not.

Rule 10. In all cases where, after the applicant shall have commenced his period of law study as provided by these rules, he has engaged in the military or naval service of the United States of America, in its late war with Spain, the time of such service shall be included as a part of the period of study required by Rule 4.

The proof of compliance with preliminary requirements under Rule 6, with respect to such service, shall be made to the satisfaction of the board of law examiners. (Adopted Dec. 13, 1898.)

Rule 1 of the general rules of practice of the Supreme Court as revised in 1896 is as follows :

 Art. 4. Rules Adopted by Board of Law Examiners.

Rule 1. Applicants for admission as attorneys.

Applicants for admission as attorneys and counsellors who have passed the examination prescribed by the rules of the Court of Appeals, shall file the certificates of the examiners with evidence of character with the clerk of the appellate division of the proper department, at such times as shall be directed by a special order, or by rules of the court in such department.

ARTICLE IV.**RULES ADOPTED BY BOARD OF LAW EXAMINERS.****Rules 1 to 6.**

Rule 1. Each applicant for examination must file with the secretary of the board, at least fifteen days before the day appointed for holding the examination at which he intends to apply, the preliminary proofs required by the "Rules for the Admission of Attorneys and Counsellors-at-law," as amended and adopted by the judges of the Court of Appeals, December 2, 1895, to take effect January 1, 1896, from which it must appear affirmatively and specifically that all the preliminary conditions prescribed by said rules have been fulfilled, and also proof of the residence of the applicant for the six months prior to the date of the said examination, giving place, with street and number, if any, which must be made by his own affidavit. The examination fee of \$15 must be paid to the treasurer at the time the application for examination is filed.

Rule 2. Each applicant must be a citizen of the State, of full age; he may be examined in any department, whether a resident thereof or not, but the fact of his having passed the examination will be certified to the appellate division of the judicial department in which he has resided for the six months prior to his examination. He must, however, entitle his papers in the department in which he intends to apply for examination.

NOTE.—An applicant must appear for examination in the department in which he entitles his papers. He will not be examined in any other unless by permission of the board, granted at least fifteen days before the day appointed for holding the examination.

The size of the classes and the increasing difficulty in providing suitable accommodations, which must be arranged for in advance, makes the rigid enforcement of this rule necessary.

Rule 3. In applying the provisions of rules 4 and 5 of the rules of the Court of Appeals, "For the admission of Attorneys and Counsellors-at-law," the board will require proof that the college or university of which an applicant claims to be a graduate maintains a satisfactory standard in respect to the course of study completed by him. In case the college or university is registered with the board of regents of the State of New York as maintaining such standard, the applicant must submit to the board, with his diploma or certificate of graduation, the certificate of the said board of regents to that effect, which will be accepted by this board as *prima facie* evidence of the fact. In all other cases the applicant must submit, with his diploma or certificate of graduation, satisfactory proof of the course of study completed by him and of the character of the college or university of which he claims to be a graduate.

Rule 4. The papers filed by each applicant must be attached together, and there must be indorsed upon them the name of the applicant. The papers must be entitled: "In the Matter of the Application of _____ for Admission to the Bar." Each

Art. 4. Rules Adopted by Board of Law Examiners.

applicant must state the beginning and the end of each term spent in a law school, as well as the beginning and the end of each vacation that he has had.

Rule 5. An applicant who has been admitted as an attorney in the highest court of original jurisdiction of another State or country, and who has remained therein as a practicing attorney for at least one year, must prove the latter fact by his own affidavit, and must present also a certificate from a judge of the court in which he was admitted, or from a county judge in said State, certifying that the applicant had remained in said State or country as a practicing attorney for a said period of one year after he had been admitted as an attorney therein. The signature of the judge must be certified to by the clerk of the court or by the county clerk under the seal of the court.

Rule 6. An applicant whose clerkship or attendance at a law school was already begun, as shown by the record of the Court of Appeals, or any other incorporated law school or law school established in connection with any college or university, and who thereafter engaged in the military or naval service of the United States of America in its late war with Spain, may have the time of such service included as a part of the period of study required by the rules of the Court of Appeals in relation to the admission of attorneys and counsellors-at-law, on proof of the facts of such service; which shall be made by his own affidavit, showing the branch of the service, the place, and the date of his enlistment or commission, and the end, or probable time of the duration of his term of service, and by the production of his honorable discharge from such service, in case of his discharge, executed by the proper authorities—which discharge shall be returned when the application for examination is approved.

CHAPTER XXIX.

COURT OF CLAIMS.

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ARTICLE I.

CODE PROVISIONS. §§ 263-280.

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§ 263. Court of Claims.

The board of claims is continued, and shall hereafter be known as the court of Claims. The court consists of the commissioners of claims now in office and their successors, who shall hereafter be known and designated as judges of the court of claims. Judges shall be appointed by the governor, by and with the advice and consent of the senate. Whenever the term of office of a judge shall expire, his successor shall be appointed for a full term of six years from the expiration of the preceding term, and all terms shall expire on the thirty-first day of December. Vacancies shall be filled in like manner for the remainder of the unexpired term. By an order to be filed in the office of the secretary of State the governor shall designate one of the judges as a presiding judge, who shall act as such during his term; two of the judges shall constitute a quorum for the transaction of business.

§ 264. Jurisdiction.

The Court of Claims possesses all the powers and jurisdiction of the board of claims.

Art. 1. Code Provisions.

It also has jurisdiction to hear and determine a private claim against the State, which shall have accrued within two years before the claim is filed. It may also hear and determine any claim on the part of the State against the claimant, or against his assignor at the time of the assignment; and must render judgment for such sum as should be paid by or to the State. But the court has no jurisdiction of a claim submitted by law to any other tribuna or officer for audit or determination. Where jurisdiction to hear and determine a claim is conferred upon the court by a special law, the liability of the State is not thereby implied, but such a claim is subject to defence and counterclaim by the State in the same manner and to the same extent as if presented under a general law.

§ 265. Rules and procedure.

The court may establish rules for its government, and the regulation of practice therein; prescribe the forms and methods of procedure before it, vacate or modify judgments, and grant new trials.

§ 266. Officers.

The court shall appoint, and may at pleasure remove, a clerk, a deputy clerk, a stenographer, and a marshal, who shall also act as messenger; and they shall perform such duties as the court may prescribe. Before entering upon the duties of his office, the clerk shall make and file in the office of the comptroller, a bond for the faithful performance of his duties in an amount and with sufficient sureties to be approved by at least two of the judges, which approval shall be indorsed on said bond.

§ 267. Seal of court.

The court shall adopt and procure an official seal, with suitable device and inscription. A description of such seal, with an impression thereof, shall be filed in the office of the secretary of State. The expense of procuring such seal shall be paid out of the contingent fund of the court.

§ 268. Sessions, duty of sheriff.

The court shall hold at least four sessions in each year at the capitol in the city of Albany, and it may also hold adjourned or special sessions at such other times and places in the State as it may determine. It may also hold a session and take testimony where the claimant resides or where the claim is alleged to have arisen, or in the vicinity, and may view any premises affected by the proceeding. The sheriff of any county, except Albany, shall furnish for the use of the court suitable rooms in the court-house of his county for any session ordered to be held thereat, and shall if required attend said session. His fees for attendance shall be paid out of the contingent fund of the court, at the same rate as for attending a term of the Supreme Court, in that county.

§ 269. Judgments.

The determination of the court upon a claim shall be by a judgment to be entered in a book to be kept by the clerk for that purpose, and signed and certified by him. Within ten days after the entry of the judgment, the clerk shall serve a certified copy thereof on the claimant or his attorney and also upon the attorney-general. If the claim arises in a case where the State seeks to appropriate or has appropriated land for a public use, the judgment shall contain a description of such land. A transcript of a judgment in favor of the State, certified by the clerk of the court, may be filed and docketed in the clerk's office of any county; and upon being so docketed shall become and be a lien upon the property of the claimant in that county, to the same extent and enforceable by execution in the same manner, as a judgment of the Supreme Court. A final judgment against the claimant on any claim prosecuted as provided in

Art. I. Code Provisions.

this article shall forever bar any further claim or demand against the State arising out of the matters involved in the controversy.

§ 270. Duty of attorney-general and superintendent of public works.

The attorney-general shall represent the State in all proceedings relating to claims. In all cases of canal claims the superintendent of public works, on request from the attorney-general, shall furnish such assistance as he may require in subpoenaing witnesses and preparing the cases for trial. The attorney-general may designate a clerk in his office to assist in the preparation of cases for trial, and to attend a term of the court. His reasonable and necessary expenses while engaged in such duty, except in Albany, when approved by the attorney-general, shall be audited by the court and paid out of its contingent fund.

§ 271. Record of proceedings; report.

The court shall keep a record of its proceedings, and, at the commencement of each session of the legislature, and at such other times during the session as it may deem proper, or as the senate or assembly may request, report to the legislature the claims upon which it has finally acted, with a statement of the judgment rendered in each case.

§ 272. Expense of procuring testimony on commission.

When testimony is taken on commission at the instance of the claimant, the expense thereof, including the fees of the commissioner, shall be paid by the claimant; and when taken at the instance of the State, such fees and all expense incurred by the attorney-general shall be paid out of the contingent fund of the court.

§ 273. Annual report to comptroller.

On the first day of January in each year, the clerk shall report, to the comptroller, under oath, a detailed statement of his disbursements made under the direction of the court from its contingent fund during the preceding year.

§ 274. Costs not to be taxed.

Costs, witnesses' fees, and disbursements shall not be taxed, nor shall counsel or attorney fees be allowed by the court to any party.

§ 275. Appeals.

Either party may appeal from an order or judgment of the Court of Claims to the appellate division of the Supreme Court of the third department. The appeal from a judgment may be taken upon questions of law or of fact, or both, or for an alleged excess or insufficiency of the judgment. Upon such appeal, the court may affirm, reverse, or modify the judgment, or dismiss the appeal, or grant a new trial. The provisions of this Code relating to appeals in the Supreme Court apply, so far as practicable, to appeals from orders or judgments of the Court of Claims, except as modified in this article.

§ 276. Time and manner of taking appeal.

An appeal must be taken within thirty days after the entry and service of the order, or the service by the clerk of a certified copy of the judgment, by serving upon the claimant or his attorney, or upon the attorney-general, and upon the clerk, in like manner as in the Supreme Court, a written notice to the effect that the appellant appeals from the order or from the judgment or from a specified part thereof, and briefly stating the grounds of the appeal.

§ 277. Case on appeal.

With the notice of appeal from a judgment, the appellant shall serve upon the ad-

 Art. 2. Rules of Practice.

verse party a case containing so much of the evidence as the appellant may deem necessary to present the questions raised by the appeal. Within ten days after the service of the case, the respondent may propose and serve amendments thereto, and the case may be settled upon five days' notice by any judge of the court. Notice of the settlement may be served by either party, within ten days after service of the proposed amendments. The court, or a judge thereof, may extend the time for serving a case or amendments.

§ 278. Preference on appeals.

An appeal taken after the calendar for a term of the appellate court is prepared may be placed thereon upon the application of the attorney-general at any time during the then current term, and brought on for hearing as a preferred cause upon a notice of fourteen days.

§ 279. Salary of judge of Court of Claims.

Each judge of the Court of Claims shall receive an annual compensation of five thousand dollars, payable monthly, and also his necessary expenses, not exceeding five hundred dollars per annum.

§ 280. Salaries of officers of Court of Claims.

Each officer of the Court of Claims shall receive an annual salary, payable monthly, and other compensation as follows :

1. The clerk, four thousand dollars.
 2. The deputy clerk, two thousand five hundred dollars.
 3. The stenographer, two thousand five hundred dollars, and five cents a folio for copies of minutes and testimony furnished at the request of the claimant.
 4. The marshal, including also his services as messenger, twelve hundred dollars.
- The clerk, deputy clerk, stenographer, and marshal shall be paid their actual expenses while in the discharge of their respective duties, elsewhere than in the city of Albany, to be audited by the court and paid from the contingent fund. No charge shall be made against the State by the clerk or the stenographer for copies of minutes, testimony, or papers, furnished to the attorney-general or to the court, or filed in the office of the clerk.

ARTICLE II.

RULES OF PRACTICE. Rules 1 to 33.

(Adopted April 20, 1898.)

Rule 1. Filing claims.

A claim is filed with the court by delivering the same to the clerk at his office in the capitol at Albany during office hours.

Rule 2. Form and contents.

Every claim filed shall be written or printed, indorsed substantially:

IN COURT OF CLAIMS—STATE OF NEW YORK.

A. B., Claimant,

agst.

The State of New York.

The claim shall state in a brief and concise manner the facts constituting the claim, the time when and the place where the claim arose, and shall have annexed thereto, and as a part thereof, a bill of particulars, stating in detail each and every item claimed, and the amount of such item.

If the claim is for lands permanently or temporarily appropriated by the State, the

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claim must contain a specific description of the land, showing its location and quantity, and in case of permanent appropriation, a map thereof.

When a claim is filed under a special act of the legislature, such act shall be set out in full in the claim.

Every claim shall state whether the claim has been submitted by law to any other tribunal or officer for audit or determination.

Every claim shall state that said claim has not been assigned, or, if assigned, when and to whom, and shall state the name and residence of every person interested in the claim, and that no other person has any interest therein, or, if any other person has an interest therein, shall state specifically what interest.

The claim and the bill of particulars shall be signed by the claimant or his attorney, who shall indorse thereon his office and postoffice address.

The claim and the reply must be verified in the same manner as pleadings in the Supreme Court.

Rule 3. Pleadings.

The date of issue is the date of filing the claim. No answer or other pleading, on the part of the State, to any claim filed with the court, except where a claim in favor of the State exists against a claimant in the nature of a counterclaim, is required to be filed; and all allegations contained in any claim filed shall be deemed and taken as denied on the part of the State.

The statements made in a counterclaim in favor of the State shall be taken as admitted, unless a reply thereto, duly verified, shall be filed and served as hereinafter prescribed.

The party filing an answer or reply shall deliver to the clerk a like number of copies thereof, as is required under these rules for copies of claims filed.

Rule 4. Counterclaims.

An answer setting forth a counterclaim in favor of the State against the claimant, or his assignor, shall be verified by the attorney-general, or one of his deputies, and shall be governed as to its form and contents by the provisions of rule 2, relating to claims, so far as the same may be applicable thereto.

Such counterclaim shall be filed, and a copy thereof served on the claimant, or his attorney, at least ten days before the beginning of the term at which the case is to be tried. And the claimant must file a verified reply to the counterclaim within twenty days after service thereof upon him, except as hereinafter provided in rule 8.

Rule 5. Pleadings must be verified.

The clerk shall not receive or file any claim, counterclaim, or reply unless the same is verified as prescribed in the rules of the court.

Rule 6. Numbering claims.

Every claim shall be numbered in the order of its filing, and all amended or supplemental claims shall take the same number as the original claim.

The claimant or his attorney shall be notified by the clerk of the date his claim was filed and the number of such claim; such number shall be used by the claimant or his attorney upon all papers in the case.

Rule 7. Copies of claims.

The claimant shall at the time of filing his claim, or within ten days thereafter, deliver to the clerk twelve printed copies of his claim and bill of particulars. The clerk shall forthwith deliver three copies of said claim to the attorney-general or his deputy, and shall retain the other nine copies for the use of the court.

If the claim does not exceed \$200, written or type-written copies may be furnished.

Art. 2. Rules of Practice.

When the claim is required to be printed, counterclaims and replies shall be printed, and the same number of copies filed with the clerk.

Rule 8. Amendments.

The court may in its discretion, and in furtherance of justice, allow amendments to claims or any pleading. A claim, counterclaim, or reply may be amended, or a counterclaim may be served, at any time before trial, upon the consent of the court. The time when such amendment is allowed shall be stated and entered upon the minutes.

A claim or counterclaim may, in the discretion of the court, be amended upon the hearing so as to conform with the facts proven.

The rules regulating the filing and service of original pleadings shall apply to amended pleadings, except that no reply need be made to a counterclaim when the same is served within ten days of the beginning of the term at which the claim is to be heard.

Rule 9. Dismissing claim.

The attorney-general may, upon ten days' notice, move to dismiss a claim on the ground that the facts stated in the claim do not constitute a legal or equitable claim against the State. Such notice shall state particularly the ground of the motion, and point out specifically the alleged defects in the claim.

Any claimant, against whom a claim is filed as a counterclaim on the part of the State, may make like motion upon like notice to the attorney-general.

Rule 10. Hearing and notice thereof.

Claims may be brought to hearing at any stated session of the court by claimant, upon twenty days' notice by mail to the attorney-general and filing a note of issue with the clerk twenty days prior to the session.

The clerk shall place upon the calendar for any stated session such other claims as may be designated by the attorney-general in a written notice filed with the clerk before such calendar is made up, and the attorney-general may move the hearing or dismissal of such claims without further notice.

When the court has appointed a special session to be held at any place for the hearing of claims, and has made an order designating the claims to be placed on the calendar for hearing at that session, all such claims shall be deemed to have been noticed by both parties.

Rule 11. Trial calendar.

The clerk shall, unless otherwise directed by the court, make a calendar of claims to be heard for each stated or special session of the court, placing thereon such claims in which notes of issue shall have been filed, or which have been stipulated on the calendar, or which may have been ordered thereon by the court or designated by the attorney-general under rule 10.

A copy of such calendar shall be mailed by the clerk, at least ten days before the beginning of the session, to each claimant whose claim appears thereon, or to his attorney if he has appeared by attorney.

Rule 12. Dismissing for want of prosecution.

When at a session of the court a claim is called upon the calendar and no one appears for the claimant, the same will be dismissed for want of prosecution.

Rule 13. Claims passed.

Any claim which is regularly called and passed without postponement by the court for good cause shown at the time of the call, will be placed upon all subsequent calendars as if the claim had been filed on the day when it was so passed.

Art. 2. Rules of Practice.

Rule 14. Infant claimant.

A guardian *ad litem* may be appointed for an infant claimant by the court, or one of the judges thereof, in the manner provided for by the rules of practice of the Supreme Court.

Rule 15. Discontinuance.

Where a counterclaim is pleaded by the State, the claimant shall not have the right to discontinue his claim.

Rule 16. Commission.

In any claim pending before the court, either party, upon sufficient cause shown, may obtain an order for and a commission from the court to take testimony within or without the State, to be used upon the hearing, in like manner and in like cases as commissions are issued in actions or proceedings in the Supreme Court. The court may also, upon stipulation, or upon sufficient cause shown, make its order appointing a commissioner, before whom proofs and testimony in any claim pending may be taken and reported to the court and filed with the clerk.

Rule 17. Depositions.

Upon the application of the claimant, or the attorney-general, and upon proper proof by affidavit, an order may be made by a judge at chambers for taking the deposition of a claimant or a witness who is so aged, sick or infirm as to be unable to attend in court and whose testimony is necessary and material for the applicant, before the judge granting the application or a referee designated for that purpose. Such notice of the time and place of taking such deposition must be given by the party applying therefor as is prescribed by the judge making the order, and the rules and practice of the Supreme Court, so far as the same may be applicable, shall govern the taking and use of such deposition.

Rule 18. Subpœnas and attachments.

In any claim pending before this court, either party may issue to and serve subpœnas upon witnesses to appear and testify, and for the production of books and papers, as the same are issued and served in actions in the Supreme Court in trials before referees. The names of the judges and clerk shall be inserted in such subpœnas in place of the names of the referee and county clerk. Either party may apply for, and obtain from the court, an attachment to compel obedience to such subpœnas, and for punishment for contempt upon like proofs, and as practiced and allowed in actions in the Supreme Court.

Rule 19. Substitution of attorney.

In case of substitution of attorney for claimant, written notice of such substitution shall be filed with the clerk, and notice thereof served on the attorney-general, and the clerk shall make the necessary entry thereof.

Rule 20. Inspection of papers.

Upon sufficient cause shown to the court, either party to any claim pending may be compelled to produce and discover, or to give to the other party an inspection and copy or permission to take a copy of any book, document, map, plan, or other paper in his possession or under his control, relating to the merits of the claim, or of the defence therein, in like manner and in like cases as is provided by the statutes or by the rules of the Supreme Court in actions therein.

Rule 21. Arguments. Briefs.

Any claim heard may be submitted upon proofs taken therein, or upon an agreed statement of facts, with or without oral argument. Briefs may be filed within a time

Art. 2. Rules of Practice.

allowed by the court. When briefs are filed twelve printed copies shall be delivered to the clerk and shall be distributed by him in like manner as copies of claims.

Rule 22. Judgments.

A judgment of the court shall contain a recital of the filing of the claim, its date, number, nature, amount asked, appearances, and trial, and, if any, the findings of fact and conclusions of law thereupon.

Rule 23. Judgment roll.

The judgment roll shall consist of the original claim and all amendments or supplemental claims and other pleadings, certified copies of all orders, all stipulations made in writing, and a certified copy of the final order or judgment, which shall be attached and filed in a suitable place in the office of the clerk. When a claim is for the permanent appropriation of land, any map and description of such land furnished by the State engineer and surveyor shall also be made a part of the judgment roll.

In cases where an appeal is taken, the notice of such appeal and all papers required to be filed with or served upon the clerk, the final order or judgment of the appellate court, the papers in all proceedings thereafter in this court and a certified copy of the final judgment of this court shall be attached to and made a part of the original roll.

Rule 24. Appeals. How taken.

An appeal must be taken within thirty days after the entry and service of the order, or the service by the clerk of a certified copy of the judgment, by serving upon the claimant or his attorney, or upon the attorney-general, and upon the clerk, in like manner as in the Supreme Court, a written notice to the effect that the appellant appeals from the order or from the judgment or from a specified part thereof, and briefly stating the grounds of the appeal.

This is § 276 of the Code of Civil Procedure.

Rule 25. Case on appeal.

With the notice of appeal from a judgment, the appellant shall serve upon the adverse party a case containing so much of the evidence as the appellant may deem necessary to present the question raised by the appeal. Within ten days after the service of the case, the respondent may propose and serve amendments thereto, and the case may be settled upon five days' notice by any judge of the court. Notice of the settlement may be served by either party, within ten days after service of proposed amendments. The court or a judge thereof may extend the time for serving a case or amendments.

This is § 277 of the Code of Civil Procedure.

The claimant or his attorney and the attorney-general may agree on the facts proven to be inserted in the case instead of the testimony on the approval of the court or a judge thereof, and may agree upon and settle between them a case by stipulation, subject to such approval.

Rule 26. Filing case.

Upon the settlement of a case, the court or a judge thereof shall make and sign a statement thereon or thereto of such settlement, and an order that the same be filed with the clerk of this court. After a case, or a case and exceptions, is so settled and ordered filed, the party making the case shall file the same with the clerk of this court, within ten days thereafter, or it shall be deemed abandoned, unless the time is extended by stipulation or order.

The clerk shall not file a case, or case and exceptions, unless the same is ordered filed as herein provided.

 Art. 3. Precedents for Notice of Claim.

Rule 27. When case is not filed.

When a case is not filed as provided in rule 25, and upon filing an affidavit that such case has not been filed, and showing the time of the settlement thereof, and the date of the order, and that more than ten days have elapsed from the time of such order, or from the expiration of the time to which it was extended by order or stipulation, an order will be entered declaring the same abandoned, and the party may proceed as if no case and exceptions had been made.

Rule 28. Order and judgments upon remittitur. Costs.

On the decision of the appellate division of the Supreme Court in any appeal from an order or judgment of the court, the *remittitur* of said court shall be filed with the clerk. Upon application of either party, and upon said *remittitur*, the court shall make its order that the judgment and decision of said appellate division be made the order or judgment of this court and that an order or judgment of this court be entered in accordance with the decision and judgment of the said appellate court. When costs of appeal in said Supreme Court are allowed, the same may be stipulated by the parties, and if not stipulated shall be taxed by the clerk in like manner as costs are taxed in actions in the Supreme Court.

Rule 29. Papers folioed.

All claims and all papers exceeding two folios in length, filed with or furnished to this court under these rules, shall be folioed.

Rule 30. Time may be extended.

The time within which an act is required to be done, excepting the time to file claims or to appeal, may be extended by order of the court or a judge thereof.

Rule 31. Notice, service of.

Any notice required to be served by the rules or practice of this court may be served by mail. If upon the claimant or his attorney, by directing the same to him at the postoffice address indorsed upon the claim filed.

Rule 32. Rules of Supreme Court.

The rules and practice of the Supreme Court, so far as they may be applicable and not inconsistent with these rules, shall be deemed rules of this court.

Rule 33. These rules shall take effect immediately.

ARTICLE III.

PRECEDENTS FOR NOTICE OF CLAIM.

Precedent for Claim for Injury to Real Estate by Canal.

 IN COURT OF CLAIMS—STATE OF NEW YORK.

Jesse Groat, Claimant,	}
<i>agst.</i>	
The State of New York.	

The above-named claimant for a claim against the State of New York states to the Court of Claims the following facts :

That the said State of New York now is, and at all the times here-

 Art. 3. Precedents for Notice of Claim.

inafter stated was, the owner of a canal, known as the Erie Canal, running from Buffalo to Albany in said State, and used as a medium of transportation for merchandise, and that said State was, by its agents and servants, engaged in the operation and maintenance of said canal.

That the claimant herein is the owner in fee-simple of certain real premises adjacent to and abutting on said Erie Canal, which lands are bounded and described as follows: (Here insert description of premises.)

That the defendant, by its contractors, agents, and servants, on and prior to May 1, 1898, altered and enlarged the said Erie Canal, adjacent to the above-described premises, and in making such alterations and enlargement, deepening the said canal about two feet; that the defendant unlawfully failed and omitted to properly protect the sides, bottom, embankment, and walls of said canal at said point, and on account of said unlawful failure and omission of defendant, the water of said canal has percolated through the side, bottom, embankment, or walls of said canal, and worked a passage through and over and into the premises and cellar of the building aforesaid, and that a constant stream of water flows into the cellar of said building; that the walls, plastering, and foundation of said building have been weakened on account thereof to the extent that there is danger of the same collapsing and falling down; that the building has settled and is otherwise damaged; that the said building is in an unfit, unsafe, and unwholesome condition to live in, and the claimant has suffered much damage on account thereof in property, health, and person.

That, by reason of the facts aforesaid, there is now justly due and owing to the claimant from the State of New York, the sum of one thousand and twenty-two dollars, as set forth in the bill of particulars hereto annexed and made a part hereof.

That this claim has never before been presented to any department of this State, nor has it, or any interest therein, been assigned, and the only person interested therein is the claimant, who resides in the city of Amsterdam, N. Y.

HARVEY BROOK,

Attorney for Claimant,

Office and Postoffice Address, Miller Block, Amsterdam, N. Y.

STATE OF NEW YORK, }
 COUNTY OF MONTGOMERY, } ss.;

Jesse Groat, being duly sworn, says that he is the claimant in the above-entitled claim; that he has heard read the foregoing claim, and knows the contents thereof, and that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JESSE GROAT.

Subscribed and sworn to before me }
 this 23d day of November, 1898. }

MATTHEW DWYER,

Notary Public.

Art. 3. Precedents for Notice of Claim.

Claimant's Bill of Particulars.

IN COURT OF CLAIMS—STATE OF NEW YORK.

Jesse Groat, Claimant,

agst.

The State of New York.

To damages to the walls, foundation, and building heretofore described	\$600 00
To damage suffered by sickness occasioned by the unwholesome condition of said premises.	400 00
To damages to one set bob sleighs stored in cellar of premises	20 00
To damage to ladder stored in cellar.	2 00

\$1022 00

JESSE GROAT.

Precedent for Claim for Personal Injury by Workmen on Canal.

COURT OF CLAIMS—STATE OF NEW YORK.

Jonathan G. Sanford, Claimant,

agst.

The State of New York.

1. That on or about the 17th day of May, 1898, while the claimant was employed as a common laborer, by the Superintendent of Public Works, repairing a break in the Erie Canal, about two miles east of Rotterdam Junction, Schenectady County, New York, the claimant was directed by his foreman, one John McComfre, to shovel dirt in wagons in a high embankment filled with large and dangerous stones.

2. That the defendants, not regarding their duty, conducted themselves so carelessly, negligently, and unskilfully in this behalf that they provided an unsafe, insecure, and dangerous place for their employes to work, and that said unsafe and dangerous condition was known to defendants and unknown to this claimant.

3. That for want of due care and attention to their duty in that behalf on the day and at the place aforesaid, and without any fault or negligence on the part of claimant, while the claimant was employed as aforesaid, a large rock was loosened and fell down, catching claimant's left foot, and wedging it between another large rock or stone lying on the ground, cracking the bone of said foot.

4. That by reason thereof claimant became permanently disabled, receiving great bodily injury, and for a long time remained ill, and

Art. 3. Precedents for Notice of Claim.

was obliged to, and did, expend large sums of money in attempting to cure himself, and was for a period of one month prevented from pursuing his business, and was otherwise injured to his damage in the sum of five thousand dollars.

5. That this claim has not been submitted by law to any other tribunal or officer for audit or determination, and that it has not been assigned, and that no other person has any interest in this matter whatsoever.

STIN A. YATES,

Attorney for Claimant,

331 State St., Schenectady, N. Y.

STATE OF NEW YORK, }
COUNTY OF SCHENECTADY, } ss.:

Jonathan G. Sanford, being duly sworn, deposes and says that he is the claimant in the above-entitled action. That he has heard the foregoing claim read, and knows the contents thereof; that it is true of his own knowledge except as to those matters stated on information and belief, and as to those matters he believes it to be true.

JONATHAN G. SANFORD.

Subscribed and sworn to before me }
this 15th day of October, 1898. }

H. C. GRUPE,

Notary Public.

BILL OF PARTICULARS.

To medical attendance.	\$ 100 00
To one month's loss of work.	50 00
To suffering and permanent disability.	4850 00
	<hr/>
	\$5000 00

AUSTIN A. YATES,

Attorney for Claimant,

331 State St., Schenectady, N. Y.

Precedent for Claim for Work Done under Direction of State Officers Filed under Special Act.

IN THE COURT OF CLAIMS.

Amasa J. Parker, as Receiver of the Partnership
Effects of the late firm of Weed, Parsons &
Company of Albany, New York, Claimant,

agst.

The State of New York.

For a complaint or claim herein the claimant alleges :

1. That on or about the 31st day of December, 1890, the People of the State of New York, by Frank Rice, Secretary of State, and Edward Wemple, Comptroller of said State, under and by virtue of

Art. 3. Precedents for Notice of Claim.

an act of the legislature of said State, entitled "An act to provide for public printing," passed March 5th, 1846, and Weed, Parsons & Company, of the city of Albany, entered into a certain contract bearing date on that day whereby the said firm of Weed, Parsons & Company were to do all the printing of every kind and description, and furnish all material therefor for the following named officers of the said State, viz. : The Secretary of State, the Comptroller, the Treasurer, the Attorney-General, the State Engineer and Surveyor, the Superintendent of the Banking Department, the Superintendent of Public Works, the Auditor of the Canal Department, the Commissioners of the Canal Fund, and the Commissioners of the Land Office, for a period of two years from the 20th day of January, 1891.

2. That the said claimant was by an order of the Supreme Court of the State of New York, dated the 21st day of July, 1892, duly appointed the receiver of the partnership effects of the late firm of Weed, Parsons & Company, of Albany, N. Y.

3. That on divers days and times between the 1st day of November, 1892, and the 20th day of January, 1893, the said claimant, as such receiver, was directed by the Secretary of State to do certain printing and furnish certain material consisting of different blanks and registry books for the election of members to the Constitutional Convention to be held under the provisions of chap. 398 of the Laws of 1892 ; that said claimant, as receiver of said firm of Weed, Parsons & Company, performed the work and furnished the materials so required by the order of the said Secretary of State, which said work, labor, and services, and materials furnished were under the terms of said contract of the value of \$7,918.30.

4. That said act authorizing the calling of the Convention above referred to was repealed by an act of the legislature after the completion of the work hereinbefore referred to.

5. That on or about the 18th day of May, 1893, the legislature of the State of New York passed a law authorizing and directing the Court of Claims to determine the amount due to any claimants for expenses and liabilities contracted by State officers for the purpose of carrying out the provisions of said chapter 398 of the Laws of 1892, hereinbefore referred to, and to make an award thereon. That the claim has been submitted to no other tribunal for audit or determination.

6. That no part of said amount has been paid. That no part thereof has been assigned.

7. This claimant, as receiver of Weed, Parsons & Company, is the only person interested in said claim.

8. That a bill of particulars of said claim is hereto annexed.

Wherefore this claimant demands that the State of New York be adjudged to pay the claimant the sum of seven thousand nine hundred and eighteen dollars and thirty cents (\$7,918.30), with interest thereon from the 19th day of January, 1893.

J. NEWTON FIERO,

Attorney for Claimant,

Office and Postoffice Address, 51 State Street, Albany, N. Y.

(Add verification and bill of particulars.)

Art. 3. Precedents for Notice of Claim.

**Precedent for Claim under Special Act of Legislature for
Extra Work.**

IN THE COURT OF CLAIMS—OF STATE OF NEW YORK.

John Moore, Claimant,

agst.

State of New York.

CLAIM AND BILL OF PARTICULARS.

The above-named claimant, John Moore, residing at Syracuse, N. Y., respectfully states to the court the following as his claim herein :

1. That on the 9th day of October, 1894, the said claimant and the State of New York, by George H. Bush, Stephen E. D. Hornbeek, and George Deyo, constituting the Board of Building Commissioners of the Eastern New York Reformatory, appointed pursuant to chapter 299 of the Laws of 1894, duly made and entered into a contract in writing whereby said claimant, in consideration of the sum of \$53,650, to be paid as therein provided, agreed to furnish the labor and materials to construct and finish all that portion of the proposed Eastern New York Reformatory, at Naponach, Ulster County, mentioned and described in the plans and specifications made and prepared by John F. Thomas, architect, for the excavations, concrete footings, foundations and cellar walls, etc., for the south wing and central building, and concrete footings and foundation walls for a portion of the yard wall for the said reformatory.

2. That on the 3d day of December, 1894, the aforesaid parties to said contract duly made and entered into a second and further contract in writing, whereby said claimant, in consideration of the sum of \$63,232, to be paid as therein provided, agreed to furnish the labor and materials to construct and finish all that portion of the aforesaid Reformatory, mentioned and described in the plans and specifications made and prepared by the aforesaid architect for excavations, concrete footings, foundations and cellar-walls, piers, etc., for the south wing and for the administration building and superintendent's residence for said reformatory.

3. That on the first day of August, 1895, the aforesaid parties to said contracts duly made and entered into a third and further contract in writing, whereby said claimant in consideration of the sum of \$96,750, to be paid as therein provided, agreed to furnish the labor and materials to construct and finish all that portion of said reformatory, mentioned and described in the plans and specifications made and prepared by the aforesaid architect, for the masonry, iron work, etc., of the central building of said reformatory.

4. That on the 25th day of August, 1895, the following resolution was adopted by the aforesaid Board of Commissioners of said reformatory :

Whereas, John Moore, the contractor for the central building of the Eastern New York Reformatory, reports to this board that it is

Art. 3. Precedents for Notice of Claim.

impossible to procure sound stone of proper dimensions from the Shawwangunk Mountain for trimmings of said building; and whereas, the architect has recommended by a communication in writing to this board, that in the event of it being impossible to procure sound stone from Shawwangunk Mountain for trimmings, that the best quality of selected stone from the quarries at Berea, Ohio, be substituted, therefore be it

Resolved, that John Moore, the contractor, be instructed and directed to substitute for said Shawwangunk Mountain stone the best quality of selected stone from the quarries at Berea, Ohio. This stone to be free from spots, streaks and iron veins, or pyrites and all imperfections, said stone to be used for trimmings. By trimmings is intended all of the stone colored blue on scale plans and known on the specifications as cut-stone trimmings; and that he be allowed therefor, in addition to the amount specified for erecting said building in his contract, the sum of \$10,000.

5. The aforesaid act of the legislature, chapter 299, Laws of 1894, and the acts amendatory thereof and supplementary thereto, and the aforesaid contracts, plans, and specifications are hereby referred to as part hereof.

6. The claimant further states that after said contracts were made as aforesaid, he proceeded diligently to carry out the same under the constant supervision of said board and architect as therein provided; and that in the month of November, 1896, all the work and materials required by said contracts, plans, and specifications were fully furnished and finished by said claimant. That thereupon the said architect made his certificate, as by said contracts provided, that said contracts had been complied with to his satisfaction; and that on or about the 28th day of November, 1896, authorized as required by law, the payment to this claimant of the sum of \$26,450.-50, being the unpaid balance due to said claimant of the aggregate amount of the consideration expressed in said contracts as above stated. That the items of said payment were as follows:

Balance on contract No. 1	.....	\$1,000.00
“ “ “ 2	.....	1,000.00
“ “ “ 3	.....	22,800.50
“ Berea stone,	.....	1,650.00
		<hr/>
		\$26,450.50

7. That at diverse times during the period covered by the claimant's performance of said contracts as aforesaid, it became and was necessary to furnish a large amount of labor and materials additional to those specifically provided for by said contracts. That such extra work and materials so furnished were ordered and directed by said board and said architect as indispensable to the full and proper execution of said contracts, through unforeseen contingencies and changes impossible to provide for in connection with erections so extensive in character; and that all such extra work and materials were furnished to the satisfaction of said board and said architect and were reasonably worth the sum of \$22,691.14.

Art. 4. Procedure and Appeals.

8. That when it became necessary to furnish such extra work as aforesaid, it was understood and agreed by and between said parties that the payment of the same should be adjusted and made upon the final completion of said contracts, which was, as above set forth, in the month of November, 1896.

9. That thereupon the said claim, after the aforesaid extra work was performed and materials furnished, was submitted to said board for adjustment, audit, and payment; but that the said board has neglected and refused to adjust said claim, and the same remains wholly unpaid. That said claim has not been otherwise submitted by law to any other tribunal or office for audit or determination, and has not been assigned by the claimant. That no other person has any interest therein. That the items of said claim are set forth in a Bill of Particulars hereto annexed as a part thereof. That on April 26, 1898, an act of the legislature became a law as chapter 527, Laws of 1898, conferring jurisdiction on this court to hear, audit, and determine said claim.

10. Wherefore, the claimant asks that this court award to him against the State, the sum of \$22,691.14, together with interest from the 28th day of November, 1898.

JOHNSON & TODD,

Attorneys for Claimant,

*Office and P. O. Address, 27-30 White Memorial Bldg., Syracuse, N. Y.
(Add verification and bill of particulars.)*

ARTICLE IV.

PROCEDURE AND APPEALS.

The State is only answerable before the board of claims in respect to matters it has consented to submit to its jurisdiction. *Stone v. State*, 138 N. Y. 124. A motion to dismiss a claimant's petition is in the nature of a demurrer and admits the truth of the facts contained therein. *Dermott v. State*, 99 N. Y. 101.

It is within the discretion of the Court of Claims whether or not to reopen a case if it has been finally submitted and a decision rendered. *Lake Side Paper Co. v. State*, 15 App. Div. 169, 44 Supp. 281. So held under a special statute authorizing an application for a rehearing of a specific claim. *Chaphe v. State*, 117 N. Y. 511.

Where plaintiff was injured by the falling of a bridge over a canal, it was held that, to constitute a valid filing of the claim, there must be a delivery by or on behalf of the party at the office of the canal appraisers itself. *Gates v. State*, 128 N. Y. 221, 40 St. Rep. 87.

The legislature has no power to confer jurisdiction on the board of claims to allow an award upon a claim barred by the

Art. 4. Procedure and Appeals.

Statute of Limitations. *Gates v. State*, 128 N. Y. 221, 40 St. Rep. 87. In *Lewis v. State of New York*, 96 N. Y. 71, it was held that neither chapter 444 of the Laws 1876, establishing a board of audit, nor chapter 205, Laws 1883, establishing a board of claims, created a liability on the part of the State for the negligence or malfeasance of its servants, but under the act authorizing the appraisal of claims against the State founded upon negligence of its officers in the use and management of the canals, a recovery may be had for injury caused by such negligence, where an action could have been maintained under § 1902 of the Code, and the State is liable whenever an individual engaged in a similar enterprise would be liable. *Sipple v. State*, 99 N. Y. 384, 16 Abb. N. C. 429; *Splittorf v. State*, 108 N. Y. 205; *Bowen v. State*, 108 N. Y. 166.

In *Rexford v. State*, 105 N. Y. 229, it was held that under chapter 321, Laws 1876, a claim against the State for personal injuries could be sustained by a person rightfully passing upon the berme-bank of the canal while climbing up the side of the bridge upon the irons provided for that purpose when a loose stone on the top fell out and threw him to the ground. Notwithstanding an act authorizing an abandonment of the canal, the State is still liable for injuries suffered from failure to keep in repair the bridges which it still maintains, and the Court of Claims has power to award damages for such injuries. *Woodman v. State*, 127 N. Y. 397, 38 St. Rep. 940.

But on the hearing of a claim for damages sustained by an overflow caused by negligence in not keeping in repair the guard bank of the river made necessary in the construction of the canal, where it appeared that the State had abandoned and sold the canal and the lands connected therewith more than seven years before the claim accrued, it was held the board of claims had no jurisdiction to consider the claim. *Stone v. State*, 138 N. Y. 124, 51 St. Rep. 718.

The act of 1885, chap. 238, providing for the determination by the Court of Claims of the claims of certain persons while acting as captain and harbor master of the port of New York, and ratifying and legalizing their acts, is not contrary to Article III., § 19, of the Constitution. *Cole v. State*, 102 N. Y. 48. Under Article VII., § 4, of the Constitution, providing that no one acting on behalf of the State shall audit, allow, or pay any claim which as between citizens would be barred by lapse of time, claims are not barred

Art. 4. Procedure and Appeals.

which have been duly presented for payment or allowance. Such claims need not be presented to the board of audit or the Court of Claims, but presented to the legislature or to any officer or body having jurisdiction to pay, allow, or act upon the claim, and the prosecution thereof with reasonable diligence is enough to suspend the running of time against the claim. *Corkings v. State*, 99 N. Y. 491, 16 Abb. N. C. 448.

This constitutional prohibition does not apply to a claim for services and materials furnished State officers, nor enforceable in any tribunal until it receives legislative recognition. *O'Hara v. State*, 112 N. Y. 146, 20 St. Rep. 647.

In *Parmenter v. State*, 135 N. Y. 154, 48 St. Rep. 129, it was held that in a case where the statute left but a very short period within which to present a claim, and it appeared that the claimant was engaged in trying to collect it by mandamus proceedings against the State comptroller, and that much of the delay was caused by the non-action of the courts which the claimant was powerless to prevent, it was held that the Statute of Limitations did not run against the claim. This case was cited with approval in *Suprs. of Cayuga County v. State*, 153 N. Y. 279, which held that the limitation imposed by the Constitution upon the audit allowance or payment of the claims against the State only applies where a tribunal has been constituted by the legislature to hear and determine the controversy, and only commences to run from the time of the constitution of such tribunal.

In *Peck v. State*, 137 N. Y. 372, it was held that under the circumstances of that case the claim was barred by the Statute of Limitations, and that the Court of Claims had no power to pass upon it. Where land is taken for canal purposes, the year in which the claimant is required to file his claim does not begin to run as to lands permanently appropriated until the quantity has been determined and the boundaries described on the maps or marked on the ground by monuments. *Yaw v. State*, 127 N. Y. 190, 38 St. Rep. 60.

Where a claim was presented and proved under the act of 1870, for continuous damages, part accruing within two years, the claimant is entitled to recover damages accruing within that period; it is only prior damages that are barred. *Folts v. State*, 118 N. Y. 406. Chapter 321, Laws 1870, does not confer a new jurisdiction to hear claims against the State for the taking of the

Art. 4. Procedure and Appeals.

fee in lands or for the appropriation of a continuous and permanent easement therein for canal purposes. *Benedict v. State*, 120 N. Y. 228.

On the hearing of a claim based on the giving away of a canal bridge over which claimants were attempting to roll heavy weights, it was held to be error to permit a witness for the State to testify that he left the bridge in his judgment safe for the ordinary uses of a highway bridge, and that stones of that size were an excessive load for the bridge as constructed. *McDonald v. State*, 127 N. Y. 18, 37 St. Rep. 248. It was held error to allow a claimant to introduce a record of a previous award made by the Court of Claims for a similar claim "to show the liability of the State." *Stone v. State*, 138 N. Y. 124, 51 St. Rep. 718.

In *State v. County of Kings*, 125 N. Y. 312, 34 St. Rep. 782, it was held that no appeal would lie from an award determining claims of the State for balances due on State tax accounts, since no appeal lies unless authorized by statute. Where a claim was wholly rejected and no award whatever made, it was held that the right to recover some sum must appear conclusively in order to raise the question of error, in the absence of an erroneous ruling adverse to the claimant. *Spencer v. State*, 135 N. Y. 619, 48 St. Rep. 442.

A statement in a notice of appeal that the court erred in receiving evidence against the objection and exception of the appellant, is sufficient to point out the error where the record did not show that any other evidence than that pointed out was admitted against objection. *McDonald v. State*, 127 N. Y. 18, 37 St. Rep. 248. Where an award is modified by the Court of Appeals only by increasing it, the modified award bears interest from the same date as the original award. *Sayre v. State*, 128 N. Y. 622, 38 St. Rep. 932.

A claim against the State for extra work done under a contract to do certain printing for each of the legislative sessions is one which in its nature would bear interest from the time it accrued, and it is proper for the Court of Claims to award it. *Sayre v. State*, 128 N. Y. 622, 38 St. Rep. 932.

The Court of Appeals has jurisdiction upon an appeal from the Court of Claims to modify an award by increasing it to an amount of damages established by undisputed evidence. *Sayre v. State*, 123 N. Y. 291, 33 St. Rep. 156.

CHAPTER XXX.

DISCHARGE OF MORTGAGES OF RECORD IN CERTAIN CASES.

Laws 1862, chap. 365, as am'd by Laws 1898, ch. 174.

§ 1. Discharge, how obtained by petition, etc.; proviso as to mortgages assigned where assignment is not acknowledged.

The mortgagor, his heirs, or any person having any interest in any lands described in any mortgage of real estate in this State, which is recorded in this State, and which, from the lapse of time, is presumed to be paid, or in any moneys into which said lands have been converted under a decree of a court of competent jurisdiction, and which are held in place of such lands to answer such mortgage, may present his petition to the courts mentioned in this act, asking that such mortgage may be discharged of record. Such petition shall be verified; it shall describe the mortgage, and when and where recorded, and shall allege that such mortgage is paid; that the mortgagee has, or if there be more than one mortgagee, that all of them have been dead for more than five years; or, if such mortgagee be a corporation or association, that such corporation or association has ceased to exist and do business as such for more than five years; the time and place of his or their death, and place of residence at the time of his or their death; whether or not letters testamentary or of administration have been taken out, or if said mortgagee or mortgagees at the time of his or their death resided out of this State, whether or not letters testamentary or of administration have been taken out in the county where such mortgaged premises are situated; or, if a corporation or association, its last place of business; the names and places of residence, as far forth as the same can be ascertained, of the heirs of such mortgagee or mortgagees; or, if such mortgagee be a corporation or association, then the names of one or more of the receivers, if any were appointed, or of the person who has the care of the closing up of the business of such corporation or association; and that such mortgage has not been assigned or transferred, and if such mortgage has been assigned, state to whom and the facts in regard to the same. Provided, however, that if such mortgage has been duly assigned, by indorsement thereof or otherwise, but not acknowledged so as to entitle the same to be recorded, then it shall be competent for the court, at any time within the period aforesaid, upon proof that all the matters hereinbefore required to be stated in said petition are true, and that the assignee of such mortgage if living, or his personal representative if dead, has been paid the amount due thereon, to make an order that such mortgage be discharged of record. Provided, further, that in case of a mortgage which was recorded more than fifty years prior to the presentation of such petition, if the petitioner is unable with reasonable diligence to ascertain the facts herein required to be stated in the petition, other than the fact of payment, the petition may set forth the best knowledge and information of the petitioner in respect thereto and what efforts have been made to ascertain such facts, and if the court shall be satisfied that the petitioner has made reasonable effort to ascertain such facts, and that the same cannot be ascertained with reasonable diligence, it may then, in its discretion, proceed upon said petition as hereinafter provided. (Thus am'd by L. 1898, ch. 174.)

§ 2. Where presented.

Such petition may be presented to the Supreme Court in the county where the

Art. 1. Provisions of the Statute.

mortgaged premises are situated, or to the county court of such county, or when situated in the city of New York, to the Superior Court thereof, or when situated in the city of Buffalo, to the Superior Court thereof. (Thus am'd by L. 1882, ch. 100.)

§ 3. Order to show cause; publication and service thereof.

The court upon the presentation of such petition, shall make an order requiring all persons interested to show cause at a certain time and place, why such mortgage should not be discharged of record. The names of the mortgagor, mortgagee, and assignee, if any, the date of the mortgage and where recorded and the town or city in which the mortgaged premises are situate shall be specified in the order. The order shall be published in such newspaper or newspapers, and for such time as the court shall direct. The court may also direct the order to be personally served upon such persons as it shall designate.

§ 4. Commission to take testimony; order of court.

The court may issue commissions to take the testimony of witnesses and may refer it to a referee to take and report proofs of the facts stated in the petition. The certificate of the proper surrogate or surrogates, whether or not letters testamentary or of administration have been issued, shall be evidence of the fact; and the certificate of the clerk of the county or counties in which the mortgage premises have been situate, since the date of the said mortgage, shall be evidence of the assignment of such mortgage, or of a notice of the pendency of an action to foreclose such mortgage, and of such other matters as may be therein stated; or if a notice of the pendency of an action to foreclose such mortgage has been filed, then his certificate that such mortgage has never been foreclosed, unless the allegation of payment shall be denied, and evidence be given tending to rebut the presumption of payment, arising from lapse of time, such lapse of time shall be sufficient evidence of payment. Upon being satisfied that the matters alleged in the petition are true, the court may make an order that the mortgage be discharged of record. (Thus am'd by L. 1882, ch. 278.)

§ 5. Duty of county clerk.

The county clerk upon being furnished with a certified copy of such order and paid the fees allowed by law for discharging mortgages, shall record said order and discharge the mortgage of record.

The act of 1862, to authorize the discharge of mortgages of record in certain cases, is designed to remove an existing incumbrance which has been paid in fact, and not by some presumption of law. The principle is well settled, and where a remedy is given by statute, all the requirements imposed by it must be complied with. *Matter of Townsend*, 4 Hun, 31, 6 Sup. Ct. 227, citing *Dudley v. Mayhew*, 3 Coms. 9; *Renwick v. Morris*, 3 Hill, 62, appeal dismissed without opinion, 63 N. Y. 631, cited and commented upon in *Pangburn v. Miles*, 10 Abb. N. C. 42 (47).

Art. 1. Precedent for Petition.

Precedent for Petition.

In the Matter of the Petition of The Trustees for
the Management and Care of the Fund for the
Support of the Episcopate in the Diocese of
Western New York for the Discharge of a Cer-
tain Mortgage.

To the County Court of Genesee County :

The petition of The Trustees for the Management and Care of the Fund for the Support of the Episcopate in the Diocese of Western New York respectfully alleges :

That your petitioner is a domestic corporation and is the owner in fee-simple of the premises situate in the town of Pembroke, Genesee County, New York, distinguished by township number twelve in the fourth range of said townships made for the Holland Land Company by Joseph Elliott, and by being part of lot number seventeen bounded as follows : (Insert description.)

That your petitioner became the owner of said premises by purchase upon a sale and foreclosure of a certain mortgage given by Elizabeth Adair and husband to James Rowan. That your petitioner has made a contract with Charles F. Tabor for the sale of said premises to him, but that said Charles F. Tabor objects to the title of your petitioner, on account of a certain mortgage purporting to be made by John G. Porter and Julia Ann, his wife, to Henry B. Blair, dated March 15, 1843, and recorded in the Genesee County clerk's office April 10, 1843, in Liber 28 of Mortgages, at page 316, to secure the payment of the sum of two hundred dollars (\$200), on or before the 15th of March, 1848, with annual interest, which said mortgage appears upon the records of said county to be undischarged and a lien upon the premises above described.

That your petitioner has made diligent inquiry of persons living in the vicinity of said property concerning the parties to said mortgage, and from such inquiry and from the time which has elapsed since the making of said mortgage and from the fact that intermediate owners of said property have never been called upon to pay any part of said mortgage, your petitioner believes, and therefore alleges, that such mortgage is paid, and that the mortgagee has been dead for more than five years. Your petitioner has not been able to ascertain and does not know the time and place of the death of the said mortgagee, Henry B. Blair, or whether or not said mortgagee at the time of his death resided in or out of this State, but your petitioner is able to state and does allege that letters testamentary or of administration upon the estate of the said Henry B. Blair have not been taken out in the county where such mortgaged premises are situated.

Your petitioner has not been able to learn and does not know the names and places of residence of the heirs of such mortgagee. Your petitioner further states that said mortgage has not been assigned or transferred and has never been foreclosed.

Your petitioner refers to the official abstracts of title made by the clerk of Genesee County, his certificate that said mortgage has never

Art. 1. Certificates of Surrogate's and County Clerks.

been assigned or foreclosed, the certificate of the surrogate of said county that no letters of administration or letters testamentary have ever been issued by the surrogate's court of said county on the estate of said Henry B. Blair; the affidavit of Julia A. Nash, who was the owner of the said mortgaged premises from the year 1851 to February 19, 1866, in which she sets forth that she never heard of the said mortgage until the year 1877, when it appeared upon an abstract made by the county clerk, that she never was called upon to pay any part of the interest or principal of said mortgage, and that she verily believes that said mortgage was long since paid, and the affidavit of Charles F. Tabor as to his inquiry in the neighborhood concerning the parties to said mortgage, and the affidavit of William A. Andrews, all of which are hereto annexed as evidence of the fact that said mortgage has been paid.

Wherefore, your petitioner prays that this court will make an order requiring all persons interested to show cause why such mortgage should not be discharged of record, and unless cause shall be shown, to make and order that said mortgage be discharged of record.

Dated September 28, 1897.

(Signature.)

(Add verification).

Certificate of Surrogate's Clerk.

STATE OF NEW YORK, }
COUNTY OF GENESEE, } ss.:
SURROGATE'S COURT, }

I, Fred A. Lewis, clerk of the surrogate's court of the county of Genesee, do hereby certify that I have examined the indexes of the records of said surrogate's court in my care and custody as the clerk of said court, and that I have found no proceeding of any nature taken in the matter of the estate of Henry B. Blair, deceased, and no letters of administration or letters testamentary issued in said estate.

In testimony whereof I have hereunto set my hand and [L. s.] affixed the seal of said court at the town of Batavia, this 14th day of September, 1897.

F. A. LEWIS,

Clerk of Surrogate's Court.

Certificate of County Clerk.

John G. Porter and Julia Ann, his wife, of
N. Y. City, Mason,

to

Henry B. Blair, of N. Y. City, Coffee
Roaster.

Mortgage dated March 15, 1843, recorded April 10, 1843, in Liber 28, page 316, for \$200, upon part of Lot 17, T. 12, R. 4, Holland Purchase, Gen. Co., N. Y., containing 100 acres, more or less, said principal payable on or before March 15, 1848, with interest annually.

GENESEE COUNTY CLERK'S OFFICE, ss.:

I hereby certify that I have examined the general indexes in this

Art. 1. Affidavit.

office for assignments of above mortgage, also for notice of pendency of an action to foreclose the same, and find none.

Witness my hand and the seal of said county this 14th day of
[L. s.] September, 1897.

C. A. HULL,
Clerk.

Affidavit.

STATE OF NEW YORK, }
COUNTY OF GENESEE, } ss. :

William A. Andrews, being duly sworn, deposes and says that he is 77 years of age, and resides in the town of Pembroke, Genesee County, New York, and is familiar with the premises heretofore sold upon a mortgage situated in said town, and upon which premises he is informed that a mortgage was executed by one John G. Porter to Henry Blair in or about the year 1843. That he came to said town in the year 1853, and with the exception of a few years' absence he has always since said year of 1853 continued to reside in said town and only a few rods distant from said mortgaged premises. That in all the time he has resided in said town he never knew any such man as John G. Porter or Henry Blair, and that since 1853 neither of them have resided upon said premises, or, so far as deponent knows, in said town of Pembroke.

And deponent further says that he never heard of said mortgage until within the last few months, and since said foreclosure.

Subscribed and sworn to before } WILLIAM A. ANDREWS.
me, August 17th, 1897. }

ANDREW F. CLARK,
Justice of the Peace.

Affidavit.

STATE OF NEW YORK, }
COUNTY OF ERIE, } ss. :
CITY OF BUFFALO, }

Charles F. Tabor, being duly sworn, deposes and says that he is well acquainted with the premises in the town of Pembroke, Genesee County, N. Y., upon which a mortgage is claimed to have been executed by one John G. Porter to Henry Blair about the year 1843. That deponent has an interest in a farm about 80 rods therefrom and has had for many years. That deponent has made inquiry in the neighborhood of said premises of the oldest residents for the purpose of ascertaining whether said Porter or said Blair is now living. That deponent has not after diligent search and inquiry been able to find any person in said town of Pembroke who knows of the location of either of said parties or has heard of them or either of them for fifty years.

And deponent verily believes from such inquiry that neither said Blair or Porter are now alive or have been residents in said town of Pembroke within fifty years.

CHARLES F. TABOR.

Sworn to before me this 18th }
day of August, 1897. }

LAFAY C. WILTSIE,
Notary Public.

Art. 1. Order to Show Cause.

Order to Show Cause.

At a term of the county court of Genesee County, held at the surrogate's office, in the village of Batavia, N. Y., on the 18th day of October, 1897 :

Present:—Hon. Safford E. North, *County Judge*.

COUNTY COURT—OF GENESEE COUNTY.

In the Matter of the Petition of The Trustees
for the Management and Care of the Fund for
the Support of the Episcopate in the Diocese
of Western New York, for the Discharge of a
certain Mortgage.

Upon reading and filing the petition of the trustees for the management and care of the fund for the support of the Episcopate in the diocese of Western New York, duly verified, which said petition describes a certain mortgage of record in the clerk's office in the county of Genesee, purporting to be made by John G. Porter and Julia Ann Porter, his wife, to Henry B. Blair, dated March 15, 1843, and recorded in said clerk's office April 10, 1843, in Liber 48 of Mortgages, at page 316, to secure the payment of the sum of two hundred dollars (\$200) on or before the 15th of March, 1848, with annual interest, which said mortgage appears to be undischarged and a lien upon the premises of said petitioner, situate in the town of Pembroke in said county; that such mortgage is paid, that the mortgagee has been dead for more than five years, that no letters testamentary or of administration upon the estate of the said mortgagee have been taken out in the said county of Genesee, and that the said petitioner has been unable to ascertain the time and place of the death of the said mortgagee, or whether or not at the time of his death he resided in or out of the State of New York, and also has been unable to learn the names and places of residence of the heirs of such mortgagee; and that such mortgage has not been assigned or transferred; and upon motion of Elbridge L. Adams, attorney for the petitioner, it is

Ordered, that all persons interested in the said mortgage be, and they are hereby, required to show cause, at a term of this court appointed to be held on the 8th day of November, 1897, at the surrogate's court in the village of Batavia, at 2 o'clock P. M., why such mortgage should not be discharged of record.

It is further ordered, that this order shall be published in the Daily News, a newspaper published in the village of Batavia in said county, once a week for two weeks.

Enter.

SAFFORD E. NORTH.

Art. 1. Order Discharging Mortgage.

Order Discharging Mortgage.

At a term of the county court of Genesee County, held at the surrogate's office, in the village of Batavia, N. Y., on the 8th day of November, 1897 :

Present :—Hon. Safford E. North, *County Judge*.

COUNTY COURT—OF GENESEE COUNTY.

In the Matter of the Petition of The Trustees
for the Management and Care of the Fund for
the Support of the Episcopate in the Diocese
of Western New York, for the Discharge of a
certain Mortgage.

The above-named petitioner, having presented to this court its petition, duly verified, describing a certain mortgage of record in the clerk's office in the county of Genesee, purporting to be made by John G. Porter and Julia Ann Porter, his wife, to Henry B. Blair, dated March 15, 1843, and recorded in said clerk's office April 10, 1843, in Liber 28 of Mortgages, at page 316, to secure the payment of the sum of two hundred dollars (\$200) on or before the 15th of March, 1848, which said mortgage appears to be undischarged and a lien upon the premises of the petitioner situated in the town of Pembroke, in said county, and alleging that such mortgage is paid, and that the mortgagee has been dead for more than five years, and that no letters testamentary or of administration upon the estate of the said mortgagee have been taken out in the said county of Genesee, and that said petitioner has been unable to ascertain the time and place of the death of the said mortgagee, or whether or not at the time of his death he resided in or out of the State of New York, and also has been unable to learn the names and places of residence of the heirs of such mortgagee, and that such mortgage has not been assigned or transferred, and this court having heretofore and on the 18th day of October, 1897, made an order, requiring all persons interested to show cause at a term of this court appointed to be held on the 8th day of November, 1897, at the surrogate's court in the village of Batavia, at two o'clock p. m., why such mortgage should not be discharged of record, and directing that the order should be published in the Daily News, a newspaper published in the village of Batavia, in said county, once a week for two weeks, and there having appeared at the time and place specified in said order Elbridge L. Adams, Esq., attorney for the petitioner, and no one having appeared to show cause why said mortgage should not be discharged, and the said petitioner having presented to the court the original abstract of title, made by the county clerk of said county, and duly certified by him to be a true statement of the records of said clerk's office, and the certificate of the surrogate of said county that no letters testamentary or of administration have been issued upon the estate of said Henry B. Blair, deceased, and the certificate of the clerk of said county that said mortgage has never been assigned, and that no notice of the pendency of an

Art. 1. Order Discharging Mortgage.

action to foreclose the same has been filed or recorded in said clerk's office, and the affidavit of Julia A. Nash, who was the owner of the premises in question, upon which the said mortgage appears to be a lien, from the year 1851 to the 19th of February, 1866, in which she deposes that she never heard of said mortgage during all of said time, and was never called upon to pay any part of the interest or principal of said mortgage, and that she verily believes that said mortgage was paid long before she owned said property, and the affidavit of William A. Andrews, of the town of Pembroke, in said county, and the affidavit of Charles F. Tabor, and the allegation of the payment of said mortgage not having been denied, and no evidence having been given to rebut the presumption of payment arising from lapse of time, and proof having been made of the publication of the order of this court granted October 18, 1897, as directed by said order, and the court being satisfied that the matters alleged in said petition are true, it is therefore

Ordered, that the mortgage purporting to be made by John G. Porter and Julia Ann, his wife, to Henry B. Blair, dated March 15, 1843, and recorded in Genesee County clerk's office April 10, 1843, in Liber 28 of Mortgages, at page 316, to secure the payment of the sum of two hundred dollars (\$200), be discharged of record, and the county clerk of said county of Genesee, upon being furnished with a certified copy of this order, and paid the fees allowed by law for discharging mortgages, shall discharge said mortgage of record.

CHAPTER XXXI.

RESIGNATION OR REMOVAL OF TRUSTEES, AND APPOINTMENT OF SUCCESSOR.

Real Property Law, §§ 91, 92. Personal Property Law, § 8.

§ 91. Trust estate not to descend.

On the death of the last surviving or sole trustee of an express trust, the trust estate shall not descend to his heirs nor pass to his next of kin or personal representatives; but in the absence of a contrary direction on the part of the person creating the same, such trust, if unexecuted, shall vest in the Supreme Court, with all the powers and duties of the original trustee, and shall be executed by some person appointed for that purpose under the direction of the court, who shall not be appointed until the beneficiary thereof shall have been brought into court by such notice in such manner as the court or a justice thereof may direct.

§ 92. Resignation or removal of trustee, and appointment of successor.

The Supreme Court has power, subject to regulations established for the purpose in the general rules of practice:

1. On his application by petition or action, to accept the resignation of a trustee, and to discharge him from the trust on such terms as are just.
2. In an action brought, or on a petition presented, by any person interested in the trust, to remove a trustee who has violated or threatens to violate his trust, or who is insolvent, or whose insolvency is apprehended, or who for any other cause shall be deemed to be an unsuitable person to execute the trust.
3. In case of the resignation or removal of a trustee, to appoint a new trustee in his place, and in the meantime, if there is no acting trustee, to cause the trust to be executed by a receiver or other officer under its direction. This section shall not apply to a trust arising or resulting by implication of law, nor where other provision is specially made by law, for the resignation or removal of a trustee or the appointment of a new trustee.

§ 8. When trust vests in Supreme Court.

On the death of a surviving trustee of an express trust, the trust estate does not pass to his next of kin or personal representatives, but, if the trust be unexecuted, it vests in the Supreme Court and shall be executed by some person appointed by the court, whom the court may invest with all or any of the power and duties of the original trustee. The beneficiary of the trust shall have such notice as the court may direct of the application for the appointment of such person. (Laws 1897, chap. 417, Art. I, § 8. This provision of the Personal Property Law stands in the place of Laws of 1882, chap. 185.)

Trustees should be permitted to resign where disagreements have arisen between them and the grantor of the trust deed who is the primary beneficiary disturbing their relations to such an extent as to render them incapable of friendly and harmonious relations. *Parker v. Allen*, 38 St. Rep. 481, 14 Supp. 265.

A trustee after acceptance cannot discharge himself from liability by resignation, and the substituted trustee must set forth

Art. 1. When Trusts Vests in Supreme Court.

the necessary facts to show the regularity of his appointment. *Crugar v. Halliday*, 11 Paige, 314, reversing 3 Edw. Ch. 565. Under the provisions of the Revised Statutes vesting in the Supreme Court any unexecuted express trust in real estate upon death of the surviving trustee, and authorizing the appointment by it of some person to complete the execution of the trust, and under provisions of chapter 185 of the Laws of 1882, making similar provisions as to personal property, upon the application for appointment of a trustee the court has jurisdiction only to inquire whether the deceased trustee was at the time of his death engaged in the execution of an apparent trust, and whether that trust remains in any respect unexecuted. If these facts appear it is the duty of the court to make the appointment. *Matter of Petition of Waring*, 99 N. Y. 114.

Upon the death of the surviving trustee the trust devolves upon the court, and power is given to the court to appoint a person to execute the trust. *Faile v. Crawford*, 30 App. Div. 536, citing *Brater v. Hopper*, 77 Hun, 246. There seems to be a distinction between the right of the court to appoint a substituted trustee and its right to appoint a person to act under its direction and execute the trust. It is held, however, in 30 App. Div. (*supra*), that it does not interfere with the rights, duties, and powers of the person so appointed. It seems that there is no power in the court to appoint a new trustee upon the death of a trustee, and it is only in a case where the trustee has resigned or is removed that the statute gives power to appoint a new trustee. Upon death of trustee the statute (1 R. S. 730, § 68) only contemplates the appointment of a person to execute the trust under the direction of the court. *Brater v. Hopper*, 77 Hun, 246.

Wilde v. Robinson, 85 Hun, 362, holds that where the Supreme Court attempts to appoint a person trustee, although it had no power to make such appointment, the person designated will be deemed to be the person appointed by the court for the purpose of executing the trust under its direction. The distinction between a trustee and a person appointed to execute the trust does not appear to be made in *Wilcox v. Gilchrist*, 85 Hun, 1 (13), nor in the *Matter of Carpenter*, 131 N. Y. 86, where it is held that under chapter 185 of the Laws of 1882, vesting in the Supreme Court unexecuted express trusts in personal property upon the death of the surviving trustee, a new trustee may be appointed

Art. I. When Trust Vests in Supreme Court.

upon *prima facie* case being made, not conclusively disproved, showing that the property in the hands of the executor or administrator was either held by him at the time of the decease of the first trustee or was the proceeds of the trust estate. On the death of the surviving trustee the trust estate does not go to his heir or legal representative, but the execution of the trust devolves upon the Court of Chancery. *Hawley v. Ross*, 7 Paige, 103; *McCosker v. Brady*, 1 Barb. Ch. 329, 1 N. Y. 214.

In *People ex rel. Collins v. Donahue*, 70 Hun, 317, 54 St. Rep. 33, 24 Supp. 437, it is held that where a valid trust has been created, and after the death of the trustee the court appoints as his successor the life beneficiary, such appointment is not null and void, and cannot be attacked collaterally. The appointment of the *cestui que trust* as successor of a testamentary trustee is irregular merely and not void. *Mulry v. Mulry*, 89 Hun, 531, 35 Supp. 618, 70 St. Rep. 411; *Locy v. Stanley*, 83 Hun, 420, 64 St. Rep. 746; S. C. 147 N. Y. 560, 70 St. Rep. 332.

Where no duties remain to be performed after the death of the trustee, except to pay the funds to the beneficiaries, it is not necessary to appoint a new trustee, but the executor of the deceased trustee may make such payments. *Boyer v. Decker*, 5 App. Div. 623, 40 Supp. 609. The appointment of a trustee by a court of general jurisdiction "to execute the trusts mentioned and declared" in the will, involves an adjudication that the trust was created in the will. *Smith v. Trust Company*, 154 N. Y. 333, affirming 12 App. Div. 278, 42 Supp. 740.

The remaindermen are entitled to notice of an application for the appointment of a new trustee upon the death of the original trustee. *Matter of Welch*, 20 App. Div. 412, 46 Supp. 689; *Matter of Reinich*, 20 App. Div. 416, 46 Supp. 902. The latter case holds that remaindermen who reside outside the jurisdiction of the court and cannot be served with notice may apply to the court for protection. In the *Matter of Welch*, *supra*, it is held that the appointment of a person as trustee who is in the employ of life beneficiary is improper where there is a contest with the remaindermen as to the application of the fund arising from the sale of real property. An order entered by default in the petition for appointment of a new trustee in the place of one deceased should not be broader than the prayer of the petition. *Matter of Levy*, 12 App. Div. 341, 42 Supp. 863.

Art. 1. Petition.

Petition.

In the Matter of the Trusteeship of the Will of
Andries Schoonmaker, deceased.

78 N. Y. 244.

To the Supreme Court of the State of New York :

The petition of Abram E. Schoonmaker, of High Falls, in the town of Rosendale, in the county of Ulster and State of New York, respectfully shows :

That in 1863, his father, Andries Schoonmaker, of the same place, died, leaving a will which was duly proved and recorded in the Ulster surrogate's office, in Book O, on page 527, July 3, 1863, and which will bears date May 8, 1863, in and by which will the said Andries Schoonmaker gave, devised, and bequeathed all his property, real and personal, to Dr. George Chambers, of Stone Ridge, in the town of Marblatown, in the county and State aforesaid, in trust for the support of the said Abram E. Schoonmaker during his natural life, and after his death the said property to vest in and become the property of the children of the said Abram E. Schoonmaker.

That the bulk of the property so devised by the said will consists of a farm at High Falls, aforesaid, of about eighty acres, and on which there is a valuable cement quarry.

That the said George Chambers now declines to act or to execute his said trust, and has executed a transfer of the title to all property which he received under said will and of all his right, title, and interest therein to Daniel E. Donovan, of Kingston, N. Y., to the end that the said Donovan may assume and execute the trusts and obligations mentioned in said will in the place and stead of the said Chambers.

That the said Donovan has expressed his willingness to accept the said trusts.

That the following are the children of the said Abram E. Schoonmaker now living, to wit :

(Insert names.)

Wherefore your petitioner prays that an order may be granted appointing Daniel E. Donovan to execute the said trusts under said will in the place and stead of the said George Chambers.

Dated July 26, 1895.

ABRAM E. SCHOONMAKER.

ULSTER COUNTY, ss. :

Abram E. Schoonmaker, the above petitioner, being duly sworn, says that he has read and heard the foregoing petition and that the same is true of his own knowledge except as to the matters therein stated on information and belief ; as to those matters he believes it to be true.

ABRAM E. SCHOONMAKER.

Sworn to and subscribed before me. }

this 27th day of July, 1895. }

JOHN E. VAN ETEN,

Notary Public, Kingston, N. Y.

I hereby consent to accept the trust mentioned in the within petition.

Dated July 29, 1895.

DANIEL E. DONOVAN.

Art. I. Order.

Order.

(Caption.)

In the Matter of the Trusteeship under the Will
of Andries Schoonmaker, deceased.

78 N. Y. 244.

Andries Schoonmaker having by his will dated May 8th, 1863, and recorded in the Ulster surrogate's office, in Book O of wills, on page 527, July 3, 1863, devised and bequeathed all his property to George Chambers, in trust for the purposes named in said will, and the said George Chambers having refused and declined to execute the said trusts and having transferred and conveyed to Daniel E. Donovan all the property received by said will, and all his right, title, and interest therein and to each and every part thereof, to the end that the said Daniel E. Donovan may execute the trusts and obligations mentioned in said will in the place and stead of George Chambers, and on reading and filing the petition of Abram E. Schoonmaker, dated and verified July 26th, 1895, joined in by Blandina N. and Andries Schoonmaker, the only two children over sixteen years of age of the said Abram, and on reading and filing the written consent of the said Daniel E. Donovan accepting said trusteeship under said will and conveyance from Chambers, and on motion of Van Etten & Clearwater, attorneys for the parties concerned, it is

Ordered, that the said transfer and conveyance from the said George Chambers to said Daniel E. Donovan is hereby approved, sanctioned, and confirmed, and the said Daniel E. Donovan is hereby appointed to execute said trust under said will in the place and stead of the said George Chambers.

T. R. WESTBROOK,

Enter.

Justice Supreme Court.

Notice of Motion.

In the Matter of the Application of James C.
Holden for leave to resign as Trustee of the
Trusts created by the Will of Albert Weber,
deceased.

126 N. Y. 589.

Take notice, that on the annexed petition and on the decree heretofore rendered in the suit of Martha Weber against Ferdinand Mayer and others, a copy of which is annexed to said petition, we shall move this court at a Special Term thereof to be held at the chambers thereof in the court-house in the city of New York on the 20th day of August, 1888, at 11 o'clock in the forenoon, or as soon thereafter as counsel can be heard, that the prayer of the said petitioner be granted, and that such other and further relief be granted the petitioner in the premises as to the court may seem just.

Dated New York, August 9, 1888.

(Directed to all parties interested).

HORNBLOWER & BYRNE,

*Attorneys for Petitioner,**No. 280 Broadway, New York.*

Art. 1. Petition.

Petition.

NEW YORK SUPREME COURT—COUNTY OF NEW YORK.

In the Matter of the Petition of
James C. Holden, etc.

126 N. Y. 589.

To the Supreme Court of the State of New York :

The petition of James C. Holden respectfully shows :

That Albert Weber, late of the city and county of New York, deceased, departed this life on the 25th day of June, 1897, leaving a last will and testament, which was duly admitted to probate by the surrogate of the county of New York on the 10th day of July, 1897. A copy of said last will and testament is hereto annexed.

That in and by said last will and testament he appointed his wife, Martha Weber, executrix, and his son Albert Weber, Junior, executor thereof, and after certain specific bequests and devises to his wife, gave all the remainder and residue of his property, real and personal, to Frederick E. Mayer, A. P. Higgins, Frederick E. Weber, Martha Weber, and Albert Weber, Junior, to hold in trust during the lifetime of the said Albert Weber, Junior, or such shorter period as provided for. The said will directed that the business as theretofore carried on by the testator should be continued as far as might be consistent with the powers and duties which he could in that behalf confer upon his said trustees according to the laws of the State of New York.

And the said will further directed that out of the earnings and profits of his said estate and until his debts and liabilities should be fully paid out of the trust estate, the trustees should pay an annuity of \$4,000 a year to his wife, Martha Weber, and an annuity of \$1,000 to each of his daughters, Robina Weber and Martha Weber, and after payment of all his debts the trustees should set apart out of his estate the sum of \$100,000, the income of which should be applied to the use of his wife, Martha Weber, during her natural life, and the further sum of \$50,000, the income of which should be applied to the use of his daughter Robina Weber during her life, and the further sum of \$50,000, the income of which should be applied to the use of his daughter Martha Weber during her life, and said annuities thereupon to cease.

And said will further directed that as far as may be consistent and proper and in accordance with the laws of the State of New York, this sum of \$100,000 and the two sums of \$50,000 each be drawn from the profits of the piano business, as the same may be carried on as aforesaid. And said will further provided that as soon as the debts and legacies and bequests provided for should be paid, and the several funds directed to be set apart and invested for his wife and daughters should be so set apart and invested, the trustees should convey the remainder and residue of his estate, real and personal, then remaining, to his son Albert Weber, Junior, to his own use and benefit absolutely forever.

And by a codicil to said will and testament, which codicil was

Art. 1. Petition.

duly admitted to probate together with said last will, and a copy of which codicil is hereto annexed, it was among other things provided that as to each of the sums of \$50,000 set apart for the benefit of the daughters of the testator, the same should upon the death of such daughter descend to and vest in her child or children or the issue of any child or children, if any, who survive her.

Your petitioner further shows that the said testator left him surviving as his only heirs at law and next of kin, his son, Albert Weber, Junior ; his two daughters, Robina and Martha (said Robina being the wife of Wm. M. Protheroe), and his widow, Martha Weber.

Your petitioner further shows that at the time of the death of said testator he was engaged in the business of manufacturing and selling pianos, and owned a large establishment in the city of New York in which the business was carried on, including certain real estate of large value upon which the factory and place of business of the said testator was located.

Your petitioner further shows that the said trustees, or some of them, entered upon the discharge of their duties and undertook to carry on the business formerly carried on by Albert Weber.

That previous to January 1, 1884, a very large indebtedness had accrued and the business carried on by said trustees became greatly embarrassed, and in the month of January, 1884, an action was commenced by Martha Weber, widow of the said Albert Weber, against the remaining trustees and parties in interest, whereby she sought to have such trustees removed and a receiver appointed, and prayed also for the appointment of a receiver pending the determination of said action. That the parties defendant to said suit were (insert names of defendants). That in said suit Julien T. Davies was appointed guardian for the *ad litem* infant defendants (insert names), and all parties duly appeared in said action.

That Charles E. Lydecker, Esq., of the city of New York, was appointed receiver in said action, and as such receiver took the property and assets of said business under his charge.

That one Frederick Rullman was made a party to said suit on his own motion on behalf of himself and other creditors similarly situated.

That on or about the 8th day of August, 1884, a decree was entered in the said action, a copy of which is hereto annexed, and in and by said decree your petitioner was appointed trustee under the last will and testament of Albert Weber, deceased, in the place and stead of the persons named therein, and the Fidelity & Casualty Company approved as surety for the said trustee, and the receiver was directed to turn over to your petitioner the property and effects in his possession, and your petitioner was made a party defendant to the said action, and it was directed that he might from time to time apply at the foot of the decree for instructions in carrying out the trusts of the said will on notice to the parties to the said action, and your petitioner thereupon entered upon the discharge of his duties as such trustee, and has been acting as such trustee continuously until the present time.

Art. 1. Petition.

Your petitioner further shows that at the time of his appointment the said estate was embarrassed by debts to the amount of \$300,000 or thereabouts, some of which was in judgment.

That the taxes upon the real estate belonging to the deceased were unpaid and in arrears for four or five years; that said property had been sold for arrears of taxes and was liable to be sold again.

That at the request of the then existing creditors of the estate, and with the consent and approbation of all parties in interest, your petitioner appointed Albert Weber, Junior, the manager of the business.

Your petitioner further says that he has paid all the indebtedness of the said business which was due and owing at the time of his appointment, except those secured by mortgage.

That he has caused to be paid all arrears of taxes upon the real estate of the testator, and that the business entrusted to his care is now upon a sound financial basis, and that the assets of the said business very largely exceed the current liabilities which are necessarily incident to the carrying on of said business.

Your petitioner further says that he is the age of 63 years and upwards, and is not in vigorous physical health; that the burden of carrying on the said business and the responsibility consequent thereupon are very heavy, and that the constant strain upon the nervous system of your petitioner is more than he is able to bear and is seriously affecting his health.

Your petitioner further says that since the date of the said decree, to wit, the 8th day of August, 1884, two other children of the said Robina Protheroe have been born, one of whom has since died, leaving three children now surviving, namely (insert names), and for whom Julien T. Davies was guardian *ad litem*, and Evelyn Protheroe, who was not a party to the said decree.

That the said Martha Weber, daughter of the said deceased, is unmarried.

That all of the just debts of the said Albert Weber existing at the time of his death, except those secured by mortgage, have been paid in full, and that the only parties now having or claiming to have any interest in said property are (insert names). All of said children of said Robina Protheroe are infants under the age of 14 years.

Wherefore, your petitioner prays that he may be permitted to resign and be discharged from his duties and responsibilities as trustee aforesaid, and that a new trustee may be appointed in his place, and that his accounts may be passed and that a referee may be appointed for the purpose of examination and passing upon his accounts, and that all the parties to the decree above referred to—and that all the parties in interest above named, may be required to show cause why he should not be permitted to resign, and that your petitioner may have such other and further relief as may be just.

Dated New York, August 9, 1888.

JAMES C. HOLDEN,

(Add verification.)

Trustee.

Art. 1. Order of Reference.

Order of Reference.

At a Special Term of the Supreme Court of the State of New York, held in and for the city and county of New York, on the 24th day of December, 1888 :

Present :—Hon. Abraham R. Lawrence, *Justice*.

In the Matter of the Petition of
James C. Holden, etc.

126 N. Y. 589.

Upon reading and filing the petition of James C. Holden, verified the 9th day of August, 1888, and a copy of the will of Albert Weber, thereto annexed, bearing date the 30th day of May, 1879, and a copy of the codicil to the said will bearing date the 18th day of June, 1879, also thereto annexed, and a copy of the judgment or decree in the suit of Martha Weber against Ferdinand Mayer and others, executors and trustees under the last will and testament of Albert Weber, deceased, and others, defendants, entered on the 8th day of August, 1884, and a copy of which is also annexed to the said petition, and on reading and filing the notice of motion annexed to said petition dated the 10th day of August, 1888, and on reading and filing the proof of due service thereof on all the parties and attorneys to whom said notice of motion is addressed, and on reading the order entered on the 10th day of August, 1885, appointing Theodore F. Hascall, Esq., guardian *ad litem* of Evelyn Protheroe, an infant, and one of the parties in this proceeding, and the papers on which the said order was granted; and also on reading the order entered in this proceeding on the 20th day of August, 1888, appointing Theo. F. Hascall, Esq., guardian *ad litem* for ——— and ———, infant parties in this proceeding, and the papers on which the said order was granted, and after hearing William B. Hornblower, of counsel for the petitioner, James C. Holden, trustee, on behalf of the said trustee, in favor of the motion, and after hearing Charles E. Lydecker, Esq., of counsel for Albert Weber, and C. C. Protheroe, Esq., of counsel for Martha Weber, Jr., and Robina Protheroe, and after hearing H. W. VanderPoel, Esq., of counsel for T. F. Hascall, guardian *ad litem*, and William Mann, Esq., of counsel for Martha Weber, widow of Albert Weber, deceased, it is

Ordered, that the prayer of the said petitioner James C. Holden for permission to resign his duties as trustee under the will of the late Albert Weber, and under the decree and judgment of this court in suit of Martha Weber against Ferdinand Mayer and others, be and it hereby is granted.

* * * * *

It is further ordered, that the same be referred to Hon. Noah Davis as referee to take proof and report to this court as to the proper person or persons to be appointed in the place of the said James C. Holden, as trustee aforesaid, and as to what would be a suitable compensation for such substituted trustee, and that the said referee report to the court with all convenient speed, and that upon the

Art. 1. Order Finally Discharging Trustee.

coming in of his report and upon final action by this court, with regard to the appointment of such trustee or trustees—and upon the qualification of the said trustee or trustees, the petitioner James C. Holden shall cease to be such trustee, and shall be relieved from his duties as such trustee, and shall turn over to his successor or successors the assets in his hands as trustee, and thereupon the said referee shall proceed as provided and directed in the order of reference made and duly entered herein in the month of December, 1888, at a Special Term of this court, and take and state the accounts of the said James C. Holden as trustee upon such notice to the parties appearing in this proceeding as the said referee may describe; and upon the coming in of the said report of the said referee upon the said accounting, and upon the approval of the same according to the rules and practice of this court, and upon his turning over to the new trustee or trustees all assets and property of trust for which he has become or shall have become responsible, the said trustee shall be finally discharged from his office.

Order Finally Discharging Trustee.

At a Special Term of the Supreme Court of the State of New York, held in and for the city and county of New York, at the chambers thereof, in the county court-house in said city, on the 8th day of August, 1889:

Present:—Hon. George L. Ingraham, *Justice*.

In the Matter of the Petition of
James C. Holden.

WHEREAS, By an order and decree, entered herein on the 31st day of July, 1889, it was among other things provided that James C. Holden, the petitioner herein, be discharged from all the duties and responsibilities of his trusteeship, and be relieved from any liability to any of the parties thereto, or any of the beneficiaries under the will of Albert Weber, deceased, or to the beneficiaries of the trust for the purposes of which he was appointed trustee, and that a certain bond for the faithful discharge of his duties, filed on the 8th day of August, 1884, in a case wherein Martha Weber, widow of Albert Weber, deceased, was plaintiff, and Ferdinand Mayer and others as executors of the trustees under the last will and testament of Albert Weber, deceased, and others, were defendants, and wherein this petitioner was appointed trustee, be vacated and cancelled, and be delivered up to Messrs. Hornblower & Byrne, attorneys for said James C. Holden, trustee, and the surety thereon fully exonerated and discharged, upon the said James C. Holden causing to be paid within five days from the entry of said order and decree to the new trustee of said trust created by the will of said Albert Weber, deceased, William Foster, \$20,000. said payment to be made upon certain conditions and terms set forth in the aforesaid decree, and in the report of Hon. Noah Davis, referee, and filed herein on the 31st day of July, 1888; and

 Art. 1. Order Substituting Trustee.

WHEREAS, In said decree it was further ordered, adjudged, and decreed, that upon the payment of the said \$20,000 to the said new trustee, William Foster, said payment to be evidenced by the affidavit of said Foster, that he has received the said money, the said James C. Holden shall be entitled to an order relieving him from all liability as trustee, and vacating and cancelling the aforesaid bond given by him for the faithful discharge of his duties, and exonerating and discharging the surety thereon, and directing the county clerk to deliver said bond to Messrs. Hornblower & Byrne, attorneys for said James C. Holden, trustee, and that said application of said James C. Holden for said order be had without further notice.

Now, on reading said decree, and on all the papers and proceedings wherein said decree was entered, and on reading and filing the affidavit of William Foster hereto annexed, whereby it appears that the said William Foster within five days from the entry of said decree received the \$20,000 referred to in said decree, it is, on motion of Messrs. Hornblower & Byrne, attorneys for said James C. Holden, trustee,

Ordered, that the said James C. Holden be and he hereby is relieved from all liability as trustee herein ; and it is

Further ordered, that the bond given by him for the faithful discharge of his duties in the action wherein Martha Weber, widow of Albert Weber, deceased, was plaintiff, and Ferdinand Mayer and other executors of and trustees under the last will and testament of said Albert Weber, deceased, and others, were defendants, said bond being filed on the 8th day of August, 1884, be vacated and cancelled, and that the surety on said bond be exonerated and discharged.

Order Substituting Trustee.

At a Special Term of the Supreme Court of the State of New York, held in and for the city and county of New York, at the county court-house in said city, on the 17th day of May, 1889 :

Present :—Hon. George L. Ingraham, *Justice*.

In the Matter of the Petition of
James C. Holden.

} 126 N. Y. 589.

WHEREAS, In a certain action in the Supreme Court of the State of New York, held in and for the county of New York, wherein Martha Weber, widow of Albert Weber, deceased, was plaintiff, and Ferdinand Mayer and others, as executors of and trustees under the last will and testament of said Albert Weber, deceased, and others were defendants, a decree was entered on or about the 8th day of August, 1884, appointing the petitioner herein, James C. Holden, sole trustee under the said last will and testament of Albert Weber, deceased, upon his qualifying as such sole trustee pursuant to the terms of said decree ; and

WHEREAS, The said James C. Holden thereafter qualified as such sole trustee as aforesaid, and entered upon the discharge of his duties as such, and has since continued therein ; and

Art. I. Order Substituting Trustee.

WHEREAS, By petition dated the 6th day of August, 1888, the said James C. Holden has applied to the court for permission to resign and be discharged from his duties and responsibilities as trustee aforesaid, and that a new trustee may be appointed in his place, and that his accounts may be passed; and

WHEREAS, By order made and entered herein in the office of the clerk of this court, on the 26th day of December, 1888, the prayer of said petitioner was granted, and the matter referred to Hon. Noah Davis, Esq., as referee, to take proofs and report to the court, among other things, a proper person or persons to be appointed in the place of the said James C. Holden as trustee aforesaid; and

WHEREAS, The said referee thereafter made and filed his report, dated the 24th day of January, 1889, together with the testimony taken by him in relation to the matters reported upon, whereby it appeared that Edward L. Hedden, Esq., of the city of New York, is a suitable and proper person to be appointed as such trustee; and

WHEREAS, Upon motion to confirm such report and order or decree of this court herein, bearing date the 31st day of January, 1889, was entered in the office of the clerk of this court on the 4th day of February, 1889, confirming the said report of Hon. Noah Davis as referee, and appointing said Edward L. Hedden as such sole trustee upon his filing his bond; and

WHEREAS, Upon proof of the refusal of said Edward L. Hedden to file his bond or to take any steps to become such trustee, and of his (the said Hedden's) desire to withdraw his consent accepting such trusteeship, and aforesaid order and decree dated the 31st day of January, 1889, and entered on the 4th day of February, 1889, was in all things vacated and set aside by order of this court, duly made and entered herein in the office of the clerk of this court on the 12th day of April, 1889; and

WHEREAS, It was by said last mentioned order referred back to Hon. Noah Davis, as referee, to take proofs and report to this court, among other things, a proper person or persons to be appointed in the place of said James C. Holden as trustee aforesaid, and as to what would be a suitable compensation for such substituted trustee; and further, that upon the coming in of the report of the said referee, and upon final action with regard to the appointment of such substituted trustee, the said petitioner, James C. Holden, shall cease to be such trustee and be relieved from his duties as such trustee, and turn over to his successor or successors the assets in his hands as such trustee; and

WHEREAS, The said referee has made and filed his report, dated the 20th day of April, 1889, together with the testimony taken by him in relation to the matters reported upon, whereby it appears that Willam Foster, Esq., of the city of Brooklyn, is a suitable and proper person to be appointed such trustee; and further, that the said Foster should, before entering upon the trust aforesaid, give bond to the people of the State of New York in the penalty of \$50,000 conditioned, for the faithful discharge of his duties as such trustee in the manner and form in such cases usually provided; and further, that the suitable compensation for such trustee shall be the sum of \$5,000 per annum

Art. 1. Order Substituting Trustee.

in lieu of all commissions, and in addition to the necessary expenses of procuring and executing the bond aforesaid.

Now, upon motion to confirm such report, etc., coming on regularly to be heard, upon reading and filing the annexed stipulation and consent of said William Foster, Esq., dated the 26th day of April, 1889, accepting the said trusteeship, and also accepting the said compensation in said referee's report provided for, and on all the papers, orders, and proceedings heretofore had herein, and after hearing _____ and _____,

Now, upon motion of C. C. Protheroe, attorney for Martha Weber, the younger, and Robina Protheroe, it is

Ordered, adjudged, and decreed, that the said report be, and the same hereby is, in all things confirmed, and that William Foster, Esq., be and he hereby is appointed trustee under the last will and testament of Albert Weber, deceased, upon his giving a bond to the people of the State of New York in the penalty of \$50,000 conditioned, for the faithful discharge of his duties as such trustee in the manner and form in such cases usually provided, and that the appointment of the said trustee shall date from the time of the filing of his bond; and it is

Further ordered, adjudged, and decreed, that the compensation of the said William Foster, Esq., shall be fixed at \$5,000 per annum, payable monthly, in lieu of all commissions, in addition to a reasonable premium to be paid for procuring the bond aforesaid, not exceeding \$500 per annum, and that the said William Foster is hereby authorized from time to time to pay himself the said compensation as the same may accrue, and charge the same to his account as trustee; and it is further

Ordered, adjudged, and decreed, that upon the filing of the said bond, the said William Foster, Esq., be and become trustee of all the property, rights, powers, and interest of the original trustees under the last will and testament of Albert Weber, deceased, and that all the property, rights, powers, and interest of the said James C. Holden, trustee under the said decretal order in the said action of Martha Weber against Ferdinand Mayer and others aforesaid, be and become charged with and subject to all the burdens and duties of such trustees in the execution of the trusts of said will, subject to the express directions of this and the aforesaid decretal order, and the orders of this court; and it is further

Ordered, adjudged, and decreed, that, subject to the directions herein contained, the said James C. Holden deliver to the said new trustee, within six days after his qualifying as aforesaid, each and every of the personal property, stocks, debts, assets, and effects held and possessed by him as such trustee, and the muniments, books, vouchers, and papers relating thereto in his custody, and that he execute, acknowledge, and deliver to the said new trustee, a conveyance of all the real property of the said estate standing in his name as said trustee.

It is further ordered, adjudged, and decreed, that upon his qualifying as aforesaid, the said William Foster, Esq., be and he hereby is made a party to this proceeding, and is also made a party defendant

Art. I. Order Substituting Trustee.

to the said action brought in this court by Martha Weber against Ferdinand Mayer and others, and as such shall be entitled to notice of any proceedings in such action, or of any other further proceedings herein, and that the said trustee or any of the parties interested may from time to time apply at the foot of this decree and the said judgment of August 8th, 1884, in said action for instructions for carrying out the trusts of the said will on notice to the parties interested ; and

It is further ordered, adjudged, and decreed, that as to all liabilities lawfully incurred by the said James C. Holden as trustee under the terms of the decree entered on the 8th day of August, 1884, appointing the said James C. Holden sole trustee under the last will and testament of said Albert Weber, deceased, or lawfully incurred under the terms of the last will and testament of the said Albert Weber, deceased, the same shall be and remain a charge upon the estate in the hands of the new trustee and upon all property delivered to the new trustee by said James C. Holden, and the said Holden, trustee, shall be relieved from all personal liability by reason thereof, or by reason of any promissory notes or other evidences of debt given by him as trustee for such indebtedness, and that the said William Foster, Esq., shall have the power and authority to liquidate and satisfy such just debts and obligations lawfully incurred by said former trustee, James C. Holden, or the trustees under the last will and testament of said Albert Weber, deceased, and to give his promissory notes as such trustee for the purpose of securing an extension of time for the payment of any such lawful debts or claims against said former trustee or trustees, and that he continue to pay the annuities provided for under the will of said Albert Weber, deceased, until the further order of this court.

It is further ordered, adjudged, and decreed, that pursuant to the order made and entered herein, dated the 26th day of December, 1888, the said James C. Holden, trustee, can have his acts and proceedings in the premises before the referee in the said order named, and expenses of the accounting of the said Holden as trustee therein, to be a charge upon the trust funds in the hands of the new trustee, unless otherwise ordered.

CHAPTER XXXII.

PROCEEDINGS UNDER ELECTION LAW.

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ARTICLE I.

SPECIAL PROCEEDINGS UNDER ELECTION LAW CONSIDERED.

An order determining a proceeding by mandamus, under § 114 of the Election Law, for a recount of ballots objected to as marked for identification, or rejected as void, is a special proceeding. *Pro. ex rel. Feeney v. Bd. of Canvassers*, 156 N. Y. 36.

In addition to the section above referred to of the Election Law, several other provisions are made for application to the court by way of summary order or mandamus, which must necessarily be regarded as special proceedings. Section 31 is authority for an application to a court justice or judge to act with reference to the adding and erasing names on the register of election. Sections 56 and 65 provide for the filing of objections to the certificate of nomination and proceedings to be had thereon in the Supreme Court or before a justice. Section 114 gives the court power to institute and carry on a judicial investigation of ballots, and § 133 prescribes the manner for correcting statements of State and county boards of canvassers.

It will be noted, upon examination of authorities, that very many and difficult cases have arisen under this statute, and several cases have been passed upon by the Court of Appeals, thus furnishing precedents for the method of procedure for this class of cases. These precedents are not readily accessible to attorneys, in the haste with which this class of proceedings must ordinarily be instituted, and the citation of authorities hereinafter given is for that reason accompanied with a very complete set of precedents applicable to each of the cases referred to.

Art. 2. Adding and Erasing Names on Register.

The importance of the subject will be best appreciated by reference to the language of the court in *Matter of Stewart*, 155 N. Y. 545, where it is said: "In order to appreciate the object of the present Election Law, it is necessary to recall the evils it was designed to remedy. The old law provided no adequate restraints upon the officials whose duty it was to canvass the votes. The inspectors made up a statement of the results, and immediately thereafter all the ballots and memoranda of the canvass were destroyed. The ballots were printed by the candidates, and the memoranda were not official. In the event of a fraudulent return made by the inspectors of the county board of canvassers, it was exceedingly difficult to make the necessary proofs in the absence of record evidence. In a flagrant case an inspector might be indicted, a *quo warranto* proceeding instituted, or an investigation before a legislative committee set in motion, but the result was usually unsatisfactory. It was out of this state of affairs there developed a public sentiment demanding an election law that should render it possible to deal effectively with errors or wilful frauds in the canvass of the votes." It is further held, *Matter of Stewart*, 155 N. Y. 545, citing *Peo. ex rel. Hirsch v. Wood*, 148 N. Y. 147, that the statute with regard to elections should be liberally construed by the courts, since the object of the election is to ascertain the popular will, and to secure the rights of duly qualified electors, that it is not intended by technical obstructions to make the right to vote insecure and difficult.

ARTICLE II.

ADDING AND ERASING NAMES ON REGISTER.

Election Law, § 31.

§ 31. Adding and erasing names on register.

If the board of inspectors at any meeting for the registration of electors shall have neglected or refused to place upon the register of electors the name of any person who is entitled to have his name placed thereon, application may be made to the Supreme Court, or any justice thereof in the judicial district in which such election district is located, or of a county adjoining such judicial district, or to a county judge of the county in which such election district is located, on a day at least two days prior to the second Saturday before any election, for an order to place such name upon the register of electors, and such court, justice, or judge may upon sufficient evidence and upon such notice of not less than twenty-four hours to the board of inspectors, and such other person interested of such application as the court, justice, or judge may require, order such inspectors to convene as a board of registration on the

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second Saturday before such election and to add the name of such person to such register of electors, and such register shall be corrected accordingly, but no court, justice, or judge shall order the name of any person to be added to the register of electors unless it shall have been omitted therefrom through the fault, error, or negligence of the election officers. In case the name of any person who will not be qualified to vote in such election district, at the election for which such registration is made, shall appear upon such register, application may be made in like manner by any elector of the town or city in which such election district is located to any court, justice, or judge hereinbefore designated, for an order striking such name from the register, and such court, justice, or judge may, upon sufficient evidence, and upon such notice of not less than twenty-four hours to the person interested of such application as the court, justice, or judge may require, served either personally or by depositing the same in the postoffice addressed to said person by his name, and at the address which appears in the register certified by the inspectors of election, proceed to convene the board of inspectors as provided herein for adding a name, and may order such board to strike such name from such register of electors, and such register shall be corrected accordingly.

Under the provisions of the Election Law as it stood in 1894, a judge at chambers had a right to strike names from the register where the name of the person not qualified or who cannot become so qualified before election appears upon the list. These provisions do not apply, however, to a case of doubt or when resting in uncertainty or depending upon inferences, or where the facts show affirmatively that the intending voter did not and cannot become qualified. If there is a dispute about the facts the judge should not intervene, but should leave the voter to swear in his vote at his peril and take upon himself the risk of his persistence. *Matter of Goodman*, 146 N. Y. 284; compare this with *Matter of Ward*, 48 St. Rep. 613, 20 Supp. 606, 29 Abb. N. C. 187; *Matter of Hamilton*, 80 Hun, 511, 62 St. Rep. 677, 30 Supp. 499, construing the provision of chapter 680 of Laws of 1892. The latter case seems to be overruled by the statute and decision in 146 N. Y. (*supra*).

It is held in the *Matter of Goodman*, 146 N. Y. 284, in discussing the question of the residence of a voter, that the intention on the part of a student to change his residence to the locality in which he is a student is not alone sufficient. Something else beyond the intending of it must occur to effect the change. Cited, approved, and followed in the *Matter of Garvey*, 147 N. Y. 117, 69 St. Rep. 393, 32 Supp. 689, where it is held, under the statutory provisions that residence for the purpose of voting cannot be gained or lost by reason of the presence or absence of persons while a student in a seminary of learning. It is

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essential to entitle a student whose legal residence has previously been elsewhere to vote in the district where the seminary is located that his intention to change his residence be manifested by acts which are independent of his presence as a student in the new locality.

An order to show cause why the name of a person should not be stricken from the register list need not be served upon any one except such person, although the order provides for service upon others. (Note present language of § 31 in that respect.) *Matter of Griffith*, 16 Misc. 128. In *People ex rel. Noel v. Smith*, 10 Misc. 100, 63 St. Rep. 600, 31 Supp. 199, it was held that a party applying for registration who has naturalization papers in his possession should produce them; if they cannot be found secondary evidence of their contents must be received, and a writ of mandamus was directed to issue to a board of registry directing them to place upon the register the names of persons as qualified voters provided they complied with such conditions.

In *Fernbacher v. Roosevelt*, 90 Hun, 454, it was held that every citizen is presumed to be a voter and has an interest in having the law carried out in the manner in which the election should be conducted; and as the statute has provided that upon the complaint of any citizen the court shall redress any wrong that shall have been committed, whether against himself or any one else, the court is bound to entertain a complaint made by him relative to a violation of the Ballot Law. Since this view is taken by the courts, and the method of enforcing the law through the courts is held to be a special proceeding, it is deemed advisable to colate so much of the Election Law as relates to action by or through the courts, together with the decisions of the courts construing those provisions, with appropriate precedents, in order that the practitioner may be able to take these proceedings in the light of authority and precedent, since they generally require to be taken hurriedly and in the midst of a political canvass, giving but little time to investigate decisions on the subject and to examine forms and precedents. It is more particularly in view of the fact that no work has, up to this time, treated of this subject, which seems to be growing in importance with each election. It must, however, be borne in mind, and it cannot be too strongly impressed upon those who may have occasion to use the precedents and follow the decisions here cited, that the Election Law has been

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the subject of continual amendment and change, and that it is difficult to extract from the authorities a rule which could be regarded as existing at any specified time. With the probability of further change by way of amendment from time to time, it will be unsafe to assume that the provisions of the law remain the same as are here given, or that the decisions rendered are applicable to changed conditions.

Order to Show Cause.*(Caption.)*

NEW YORK SUPREME COURT.

In the Matter of the Application of Oscar H. Goodman to strike from the list or registry of voters of the Twenty-fifth Election District of the Twenty-first Assembly District the name of Henry W. Bainton.

146 N. Y. 284.

Upon the annexed affidavit let Henry W. Bainton show cause before me or one of the justices of this court, at a Special Term thereof, to be held at chambers, in the county court-house, in the city of New York, on the 1st day of November, 1894, at 10:30 o'clock A. M., or as soon thereafter as counsel can be heard, why the name of said Henry W. Bainton should not be stricken from the list or registry of voters in the twenty-fifth election district of the twenty-first assembly district in said city, and why the board of inspectors of election for said election district of said assembly district should not at once reconvene and strike from the list or registry of voters the name of said Henry W. Bainton, and why the applicant should not have such other and further relief as may be just and proper. And sufficient reason appearing therefor, service of this order and of the accompanying affidavit upon the said Henry W. Bainton, on or before the 31st day of October, 1894, personally or by depositing the same on the 30th day of October, 1894, in the post-office, addressed to said Bainton at the address which appears in the registry list, certified by the inspectors of election, to wit, No. 41 East Sixty-ninth Street, in the said city, shall be sufficient.

Dated New York, October 30, 1894. GEO. C. BARRETT,

*Justice.***Petition.**

NEW YORK SUPREME COURT.

In the Matter of the Application of Oscar H. Goodman to strike from the list or registry of voters of the Twenty-fifth Election District of the Twenty-first Assembly District the name of Henry W. Bainton.

146 N. Y. 284.

CITY AND COUNTY OF NEW YORK, ss.:

Oscar H. Goodman, being duly sworn, deposes and says: **That**

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he is an elector of the twenty-fifth election district of the twenty-first assembly district of the city of New York, and resides at No. 108 East Seventy-first Street, in the city of New York, and is duly registered as a voter for the election of 1894.

Henry W. Bainton has registered in the twenty-fifth election district of the twenty-first assembly district from No. 41 East Sixty-ninth Street, in said city, as a residence.

That said No. 41 East Sixty-ninth Street is a seminary of learning, known as the "Union Theological Seminary."

That said Henry W. Bainton is a student in said seminary, and prior to his attending said seminary as a student, he was not a resident of the twenty-fifth election district of the twenty-first assembly district, in said city.

In the catalogue of the said Union Theological Seminary for the year 1893-94 the said Bainton appears as a student of the "Junior Class," as follows :

Name.	College.	Residence.	Room.
Henry W. Bainton.	C. C., 1893.	New York City.	1 South Hall.

That deponent begs leave on the argument of the motion hereon to refer to said catalogue.

That an order to show cause is requested why the name of said Bainton should not be stricken from such registry of voters, and such list be corrected accordingly, because the time before election on November 6, 1894, is less than eight days off. No previous application for such order has been made.

OSCAR H. GOODMAN.

Sworn to before me, this 29th }
day of October, 1894. }

JOSEPH KOHLER,
Notary Public.

Order Striking Name from Registry.

At a Special Term of the Supreme Court, held at chambers, in the county court-house, in the city of New York, on the 2d day of November, 1894 :

Present :—Hon. George C. Barrett, *Justice.*

In the Matter of the Application of Oscar H. Goodman to strike from the list or registry of voters of the Twenty-fifth Election District of the Twenty-first Assembly District the name of Henry W. Bainton.	} 146 N. Y. 284.

Upon reading and filing the affidavit of Oscar H. Goodman, verified the 29th day of October, 1894, and the order to show cause granted thereon, why the name of Henry W. Bainton should not be stricken from the list or registry of voters in the twenty-fifth election district of the twenty-first assembly district in the city of New York, and why the board of inspectors for registry of said election district should not reconvene and strike from the list or registry the name

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of said Henry W. Bainton, and why the applicant should not have such other or further relief as may be just and proper, and upon reading and filing the affidavit of Henry W. Bainton, verified the first day of November, 1894, and after hearing Charles H. Knox and Louis H. Hahlo, of counsel for said Oscar H. Goodman, in support of said motion, and Thomas F. Wentworth, opposed, it is, on motion of Louis H. Hahlo, the attorney for Oscar H. Goodman,

Ordered, that said motion be and the same is hereby in all respects granted ; and it is hereby

Further ordered, that the name of said Henry W. Bainton be and it is hereby stricken from the list or registry of voters of the twenty-fifth election district of the twenty-first assembly district ; and it is hereby

Further ordered, that for the purpose of carrying into effect the foregoing order, that the inspectors of election for the twenty-fifth election district of the twenty-first assembly district, to wit : Henry W. Bainton, Frank W. Kirwan, Oscar H. Goodman, and Charles H. Radecke, reconvene at the place of registry of the said election district of the said assembly district on 5th day of November, 1894, at six o'clock in the afternoon, and strike from the list or registry of voters of the twenty-fifth election district of the twenty-first assembly district the name of Henry W. Bainton.

Enter.

G. C. B.,

(Seal.)

J. S. C.

Entered and filed in the office of the clerk of the city and county of New York, on the 2d day of November, 1894.

ARTICLE III.

PARTY NOMINATIONS, OBJECTIONS TO CERTIFICATES OF NOMINATION. Election Law, part of § 56, § 65.

§ 56. Party nominations; choice of emblems for ballot.

* * * Any questions arising with reference to any device, or to the political party or other name designated in any certificate of nomination filed pursuant to the provisions of this section, or of § 57 of this article, or with reference to the construction, validity, or legality of any such certificates, shall be determined in the first instance by the officer with whom such certificate of nomination is filed. Such decision shall be in writing, and a copy thereof shall be sent forthwith by mail by such officer to the committee, if any, named upon the face of such certificate, and also to each candidate nominated by any certificate of nomination affected by such decision. The Supreme Court, or any justice thereof, within the judicial district, or any county judge within his county, shall have summary jurisdiction upon complaint of any citizen, to review the determination and acts of such officer, and to make such order in the premises as justice may require, but the final order must be made on or before the last day fixed for filing certificates of nominations to fill vacancies with such officer as provided in subdivision 1 of § 66 of this article. Such complaint shall be heard upon such notice to such officer as the said court, or justice, or judge thereof shall direct. * * *

§ 65. Objections to certificates of nomination.

A written objection to any certificate of nomination may be filed with the officer

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with whom the original certificate of nomination is filed within three days after the filing of such certificate. If such objection be filed, notice thereof shall be given forthwith by mail to the committee, if any, appointed on the face of such certificate for the purpose, specified in § 66 of this act, and also to each candidate placed in nomination by such certificate. The questions raised by such written objection shall be heard and determined as prescribed in § 56 of this act.

On a hearing to determine the validity of a certificate of nomination where proof is offered by affidavit of persons that they were not sworn to the paper upon which their names appear, the officer before whom the contest has arisen should receive the affidavits, and also that of the notary public who swore the persons in question, to the effect that he "inadvertently failed to swear" certain of the signers. The affidavit of a person whose name appears upon the certificate stating that he is the only person living at that street number given in the certificate, and that he never signed the certificate, is also admissible, as is also the affidavit of another signer that he was never sworn to the certificate. *Matter of Adams*, 21 Misc. 396. In the latter case the court states that the *Matter of Fairchild*, 151 N. Y. 359, was heard upon affidavits, and that it is the general practice to so hear matters of this character. It is further said, in the opinion by Herrick, J.: "While, perhaps, it is not evidence of the highest character, or as satisfactory as oral evidence, still it is that very commonly resorted to in summary applications of this character, and I think is sufficient, and the evidence offered to and rejected by the Secretary of State is produced upon this hearing, and I think can be considered by me." It is further held that proceedings of such a nature are summary and the rules as to pleadings, objections and evidence should not be strictly maintained as in an action.

In proceedings to determine the validity of party nominations, the decisions of party conventions, committees, or caucuses are not binding and have no weight with the court. In the absence of any special rules governing the town committee, the act of the majority is the act of the committee, and such act must be done when all are together or had notice to be present. They have no power to act except in session. *Matter of Broat*, 6 Misc. 445, 56 St. Rep. 780, 27 Supp. 176. It is held, in *Matter of Heacock*, 18 Misc. 311, 41 Supp. 161, that in determining the regularity of rival nominees, the court is not bound by the decision of the party convention. This decision, however, will be allowed full force

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and effect in the matter of the party emblem and in the selection of inspectors of election. The word "faction" as used in the Election Law refers to different political organizations of the party and not to contending members of the same organization engaged in support of the same candidate who was seeking and claiming a nomination from the same political organization.

In the *Matter of Fairchild*, 151 N. Y. 359, it was held that where questions of procedure in political conventions or committees are recognized by law and by party usage and custom, the officer called upon to determine such question should follow the decision of the regularly constituted authorities of the party, and the courts will not review the determination of such officer. The decision of the State committee of a State convention that one of two regularly called conventions was regular is to be regarded as controlling upon the courts. It is also held in *Matter of Redmond*, 5 Misc. 369, 55 St. Rep. 150, 25 Supp. 381, that what constitutes regular nominations depends upon the usages of the party and not upon any rules or regulations which may be made from the decision of the courts or judges. In the *Matter of Greene*, 9 App. Div. 223, 41 Supp. 177, it was held that the name "National Democratic Party" may be used, as it was not calculated to mislead voters. Affirmed, 150 N. Y. 566.

In *French v. Roosevelt*, 18 Misc. 307, 41 Supp. 1080, the regularity of an assembly district convention was passed upon. It was held that in New York City the roll was the only evidence of membership of the Republican convention, and the right of delegates named therein to their seats could not be questioned in proceedings for temporary organization. Where upon refusal to call the roll another convention was held in the same hall upon a roll call at which a majority of the delegates were present, the nominations of the latter convention were deemed regular. In *Matter of County Clerk of Clinton County*, 21 Misc. 543, affirmed at extraordinary term of the appellate division, third department, in October, 1897, without opinion, it was held that a primary cannot be deemed the fair expression of the wishes of the voters of the town where it was held in a hall which was occupied by the adherents of one faction to the exclusion of the others, and where the proceedings occupied only five or ten minutes, and a ballot which was demanded was refused by the chairman of the primary, who had been elected in

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the interests of the faction which was in principal occupation of the hall. Further, that the party usage in which one delegate from a town in the county casts the votes of all the assenting delegates of the town is not improper.

The party nominations when made remain in force, and the convention has no power to make any other nominations for the same office. The person first nominated is the candidate of the party and is entitled to have his name placed upon the official ballot. *People ex rel. Simpson v. Police Commissioners*, 10 Misc. 98, 31 Supp. 112, 63 St. Rep. 197. Any local party, whether regular or not, may have State nominees on the State ballot of the party to which it adheres, and also have the local nominees printed on its ballot. *Matter of Application of Wheeler*, King Co. Term, Oct. 1894, 10 Misc. 55, 30 Supp. 854, 63 St. Rep. 161. A faction of a political party which supports the State nominees is entitled to have party nominations for State officers printed upon the official ballot, although it was not recognized at the last State convention. *Matter of Mitchell*, 81 Hun, 401, 30 Supp. 962, 62 St. Rep. 121.

Under the Election Law as amended in 1895, the county clerk has no authority to insert and print under the party emblem on the official blanket ballot the names of candidates other than those duly nominated and certified to by the party whose name and emblem head the column. *Matter of Madden*, 148 N. Y. 136.

Where the statute directs that the police commissioners of the village shall be chosen at the town election, the nominations for this office must be placed on the official ballot prepared for the town included in such district. *Matter of McLane*, 12 Supp. 521. Independent organizations making nominations and claiming a right to appear on State official ballot must conform to the statute and file certificate thereof with secretary of State. *Fernbacher v. Roosevelt*, 90 Hun, 454, 35 Supp. 898, 70 St. Rep. 575, affirming 14 Misc. 199 (1894). It was held, in the *Matter of the Application of Cowee*, 33 St. Rep. 710, on a motion for mandamus to compel the clerk to recognize the petitioner as the regular nominee of the Republican party for assembly, that neither the clerk nor the court had power under the Ballot Reform Act to decide between claims of rival factions of a political party.

Where the certificate of nomination by a convention is filed and no objections filed within the time specified in the act, the county

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clerk is bound to recognize the person named as the regular nominee of the party. Under the Laws of 1890, relating to certificates of nomination and objections thereto, the decision of the county clerk, who must in the first instance pass upon the validity of the objections, shall be final unless an order of a competent court or justice of the Supreme Court be made on or before the Wednesday preceding the election. It was further held that an order of the justice of the Supreme Court made in the matter was final and that no appeal could be taken therefrom. *Matter of Woodworth*, 64 Hun, 522, 46 St. Rep. 432, 19 Supp. 525.

In the *Matter of Mitchell*, 81 Hun, 401, it was held that an application for an order under § 65 of chapter 680, Laws of 1892, overruling the decision of the officer with whom the certificate of nomination of a candidate is filed as to the validity thereof, is a special proceeding as defined by the Code, and an appeal may be taken from an order affirming or overruling the determination of such officer when the appeal can be heard and determined in due season. It is further held that inasmuch as the original Ballot Reform Act was entitled "An act to promote independence of voters," the Law of 1892, based thereon, should be interpreted so far as possible in accordance with the provisions therein indicated. It was held, in the *Matter of Woodworth*, 64 Hun, 522, that it was not the province of the court to decide abstract questions of law which could have no effect either upon the candidate or upon the election, and the court dismissed the appeal upon that ground. Subsequently a like ruling was made in *Matter of Emmett*, 9 App. Div. 237, 41 Supp. 500, to the effect that the appellate division could make no order which would be effective after the election, and that the appeal should be dismissed. On appeal, however, in 150 N. Y. 538, it was held that an appeal lies to the appellate division from an order made reviewing the determination of the filing officer upon a contested certificate of nomination under § 56, and that the provisions of that section, that an order reviewing the determination with whom the contested certificate of nomination had been filed must be made on or before the last day fixed for the filing of certificates of nomination to fill vacancies, applies only to the original order of review, provided for therein, and does not limit the time within which the appellate division may entertain and adjudicate an appeal from such an order. The order appealed from was reversed and the case re-

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manded to the appellate division to be decided as it deemed proper. See, also, *Matter of Madden*, 148 N. Y. 136, in which the court states: "While this appeal and the decision of the question is of no practical importance in this particular case, yet as the courts in the first and second departments have reached opposite conclusions upon the question, a final decision seems to be required to prevent embarrassment in the future from conflicting judicial decisions."

Petition.

In the Matter of Objections to the certificate of nomination of Ben. L. Fairchild, for Representative in Congress for the Sixteenth Congressional District, filed in the Office of the Secretary of State, of the State of New York, on the 26th day of September, 1896.

151 N. Y. 359.

William L. Ward, of Port Chester, N. Y., being duly sworn, deposes and says, that he is a citizen of the United States of America, and a resident and elector of the sixteenth congressional district of the State of New York.

Deponent further alleges on information and belief that in the month of September, 1896, at a Republican convention duly and regularly called and duly convened at White Plains, in said congressional district, in pursuance of such call, William L. Ward, this deponent, an elector of said district, residing in Port Chester in said district, was duly and regularly nominated as the candidate of the Republican party for the office of representative in Congress, to be elected at the general election to be held on the 3d day of November, 1896, and that a proper and legal certificate of such nomination duly executed and verified was thereupon and between the 24th day of September, 1896, and the 3d day of October, 1896, duly filed in the office of the secretary of State of the State of New York.

Deponent further alleges upon information and belief that a meeting or gathering of people held in the city of Yonkers, on the 16th day of September, 1896, which meeting or gathering had not been called by any committee or person authorized to call a Republican convention in said congressional district, and which was not held in pursuance of any call from any committee or other person authorized to call a Republican convention in said district and was not duly convened, pretended to nominate Ben. L. Fairchild as the Republican candidate for representative in Congress to be elected at the next general election, a certificate of which pretended nomination was filed in the office of secretary of State of the State of New York, on the 26th day of September, 1896.

That on the 29th day of September, 1896, this deponent caused to be filed in the office of said secretary of State, objections to said certificate of the nomination of Ben. L. Fairchild, setting forth, among

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other things, substantially the facts above stated, with affidavits accompanying said objections, duly verified and setting forth and showing the entire regularity and legality of the aforesaid nomination of William L. Ward, and the entire regularity and legality of the convention so held at White Plains, at and by which said Ward was so nominated, and the irregularity and illegality of the said pretended nomination of said Ben. L. Fairchild, and the entire irregularity and illegality as a convention of the meeting or gathering at Yonkers, N. Y., as aforesaid, at which said Fairchild was pretended to have been so nominated.

Reference to said objections and affidavits now on file in the office of said secretary of State being hereby made for a more full and definite statement thereof.

Notwithstanding which, the said secretary of State has, on the 9th day of October, 1896, after notifying the parties, made his decision in writing, a copy of which is hereto annexed, of which decision and determination and acts of said officer this deponent complains and respectfully asks that the same may be reviewed and such order made in the premises as justice may require on such notice to said officer as the court or justice may direct.

That no previous application for this order has been made to any court or judge.

WILLIAM L. WARD.

Sworn and subscribed before me, }
 this 9th day of October, 1896. }

ELLA McCONNELL,
Notary Public.

Order for Hearing.

In the Matter of Objections to the Certificate of Nomination of Ben. L. Fairchild, for Representative in Congress for the Sixteenth Congressional District, filed in the Office of the Secretary of State of the State of New York, on the 26th day of September, 1896.

151 N. Y. 359.

Upon the complaint of William L. Ward, a copy whereof is hereto annexed, and on motion of John Cadman and of J. Rider Cady, Esquires, attorneys, and of counsel for the said complainant:

It is ordered, that such complaint shall be heard at the court-house, in the city of Hudson, Columbia County, N. Y., on the 13th day of October, 1896, at two o'clock in the afternoon, upon notice to John Palmer, secretary of State of the State of New York, the officer whose acts and determinations are to be reviewed. Said notice shall be given by service of a copy of this order and of the complaint on which the same is made, on or before the 10th day of October, 1896, either personally upon the said John Palmer, secretary of State of the State of New York, or in case of his absence from his office, by leaving the same at the office of the secretary of State of the State of New York, in the capitol, at Albany, N. Y., with a person of suitable age and discretion.

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It is further ordered, that the said John Palmer, secretary of State of the State of New York, be, and he hereby is, required to produce upon the hearing of said complaint, all the objections, affidavits, and other papers now on file in his office, relating in any way to the above entitled matter, and upon which he made the determination complained of.

Dated Hudson, N. Y., October 9th, 1896.

SAMUEL EDWARDS,
Justice Supreme Court.

Order.

In the Matter of Objections to the Certificate of Nomination of Ben. L. Fairchild for Representative in Congress for the Sixteenth Congressional District, filed in the Office of the Secretary of State of the State of New York, on the 26th day of September, 1896.

151 N. Y. 359.

Two certificates having been filed in the office of the secretary of State of the State of New York, the one certifying that Ben. L. Fairchild had received the Republican nomination on the 16th day of September, 1896, as the candidate of the Republican party for representative in Congress for said district, and the other certifying that William L. Ward had received the nomination of the Republican party for representative in Congress for said district on the 16th day of September, 1896, and written objections to each of said certificates of nomination having been duly filed as provided by law, and it having been determined in the first instance by said secretary of State that said Ben. L. Fairchild was the Republican nominee for representative in Congress for said district, and that his name be placed on the official ballot as such candidate, to be voted for at the next ensuing general election, which determination and acts of said secretary of State were duly brought before said justice of the Supreme Court for review upon said determination and acts, and the various affidavits which have been submitted to and filed with said secretary of State in connection with said certificates, and after hearing John Cadman, J. Rider Cady, and Henry C. Henderson, in behalf of said review, and Hon. Benjamin F. Tracy and Hon. Levi F. Longley, of counsel for said Ben L. Fairchild, in behalf of said determination and acts of said secretary of State, and after reviewing said determination and acts of said secretary of State,

It is hereby ordered and decided, that William L. Ward, residing in and having his place of business in Port Chester, N. Y., is the nominee of the Republican party in said sixteenth congressional district for representative in Congress in and for said district, and that the name of said William L. Ward be placed upon the official ballot as such candidate for the Republican party.

SAMUEL EDWARDS,
Justice Supreme Court.

Art. 4. Judicial Investigation of Ballots.

ARTICLE IV.

JUDICIAL INVESTIGATION OF BALLOTS. § 114.

§ 114. Judicial investigation of ballots.

If any certified original statement of the result of the canvass in an election district shall show that any of the ballots counted at an election therein were objected to as marked for identification, a writ of mandamus may, upon the application of any candidate voted for at such election in such district within twenty days thereafter, issue out of the Supreme Court to the board or body of canvassers, if any, of the return of the inspectors of such election district, and otherwise to the inspectors of election making such statement requiring a recount of the votes of such ballots. If the court shall, in the proceedings upon such writ, determine that any such ballot was marked for the purpose of identification, the court shall order such ballot and the votes thereon to be excluded upon a recount of such votes. A like writ may in the same manner be issued to determine whether any ballot and the votes thereon which has been rejected by the inspectors as void, shall be counted. If, in the proceedings upon such writ, the court shall determine that the votes upon any such ballot rejected as void shall be counted, the court shall order such ballot and the votes thereon to be counted upon a recount of such votes. Boards of inspectors of election districts, and boards of canvassers, shall continue in office for the purpose of such proceedings.

Inspectors and canvassers have no right to decide whether the person voted for is eligible or not. Their duty is to count the votes cast for any and every person whose name appears upon the ballot and indorsed as the law directs. *People ex rel. Bradley v. Shaw*, 64 Hun, 356, 45 St. Rep. 533, 19 Supp. 302 (1892), affirmed, 133 N. Y. 493.

Mandamus may issue to compel inspectors who refuse to sign returns, to do so. They are merely ministerial officers and have no discretionary power. The eligibleness of a vote cannot be determined by them where the statutory requisites have been complied with. It is their duty to count and return all the votes cast and for each inspector to add his signature to the return; and a writ of peremptory mandamus will be granted to compel them to do so. It is not necessary that the reception of the ballot of the alleged voter should be agreed to by a majority of the board. The ballot is finally received when the elector has satisfied all the statutory tests and any inspector may deposit it.

Notice the change in the statute relative to right to sit on election day, in connection with decision in *People ex rel. Lower v. Donovan*, 135 N. Y. 76, 23 Civ. Pro. 1, 47 St. Rep. 834, reversing 63 Hun, 512, 45 St. Rep. 141, 18 Supp. 501, which holds that no court can be opened on election day except to receive a

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verdict or discharge a jury, under the statute of 1842, as it stood at the time this question arose. The court will compel inspectors by mandamus to do their duty and nothing more. When they have made and signed the statement required by law, their duties are fully discharged and they become *functus officio* as a board. They have no right to re-convene two days later, indorse the ballots, and attach them to such statement. Peremptory mandamus can only be granted to compel a body to reject the ballots, where the election officer has, during or immediately after the completion of the canvass, declared his belief that the ballots were marked for identification. *Matter of Kline*, 17 Misc. 672, 40 Supp. 600; *People ex rel. Bush v. McKenzie*, 66 Hun, 265, 49 St. Rep. 527, 21 Supp. 279, affirming 48 St. Rep. 791, 21 Supp. 279.

It is irregular for inspectors to sign a statement in blank before the canvass is commenced, but if afterwards filled out with the result agreed upon by all, it is effective. Where inspectors have made a canvass of votes and signed a statement thereof, they cannot be compelled to make another canvass or be permitted to do so. *People ex rel. Fiske v. Devermann*, 83 Hun, 181, 31 Supp. 593, 64 St. Rep. 147. Official ballots given to the proper officers and properly marked by the voters must be counted in the canvass, although the county clerk by mistake or through wilful misconduct refused to print in the column of a local party the names of the candidates for State offices nominated by the party of which said local party is a faction. A ballot is not a marked ballot because it is irregular in making it up or in printing it. *People ex rel. Hirsh v. Wood*, 148 N. Y. 142.

Filing an incorrect copy of canvass by inspectors with city clerk is not a compliance with the law, and for this failure of duty mandamus will lie in such cases to compel them to file another. *Matter of Application of Gleason v. Blanc*, 14 Misc. 620, 72 St. Rep. 371, 36 Supp. 930. Mandamus will lie to compel inspectors to correct clerical errors in violation of the law, where they have not complied with the statutory provisions; the error is not cured by the stipulation of the candidate apparently elected upon the face of the returns consenting that the clerical errors be corrected. *People ex rel. Ranton v. City of Syracuse*, 88 Hun, 203, 31 Supp. 661, 68 St. Rep. 256.

Mandamus will not be granted to compel a board of canvassers

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to re-convene and re-count the ballots cast at an election, and allow certain ballots rejected by them, where it appears that such ballots were not objected to or marked by the inspectors, for identification, or attached to the statement of the canvass. *People ex rel. Clark v. Early*, 16 Misc. 603, 40 Supp. 587.

Peremptory mandamus will not be granted where the answering affidavits raise an issue as to the facts alleged in the petition. The canvassing board has no power to reject ballots marked for identification, and mandamus will not lie to compel them to do so. *Matter of Kline*, 17 Misc. 672, 40 Supp. 600. An affidavit in an application for mandamus, though entitled in a proceeding, is not void where the body of it shows the nature and purpose of the proceeding, under § 728 of the Code, nor is an affidavit incorrectly stating the number of a senatorial district, where other allegations clearly show in which district the contest is intended to be made. Inspectors of election are not necessary parties to a proceeding to compel canvassers to recount ballots rejected as void or erroneously counted, and the writ may issue while the board of canvassers are in session, even if it has not completed its canvass. Such a writ will not be granted upon affidavits upon information and belief which do not state the sources of information or grounds of belief, or excuse failure to produce certificate of inspectors of election. *People ex rel. Watkins v. Canvassers of Oncida County*, 25 Misc. 444.

An order directing the opening of the ballot box and an inspection of the ballots will not be granted on the application of one of the candidates, upon the claim that by mistake or otherwise the figures shown by the count of the split ballots were transposed in the statement made by the inspectors. The ballot box should not be ordered opened except to aid a criminal prosecution or in a civil process where the court may make a decision binding upon the parties and the public. *Matter of Application of a Member of Assembly for the First District of Erie County*, 18 Misc. 391, which holds that a writ of mandamus should not be granted to compel a correction of returns except upon a clear case. If ballots which should have been held void and not have been counted, have been treated by the inspectors as ballots marked for the purpose of identification and counted, the court, in a mandamus proceeding under § 114, has jurisdiction to pass upon them as void ballots, and to direct the inspectors to make a state-

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ment of the result of the election. When a ballot is not void, but is to be dealt with as objected to because marked for identification under § 110, subdivision 3, great care should be observed to follow every provision of the statute designed to identify and preserve the ballots for future legal proceedings. *People of the State of New York ex rel. White v. Board of Aldermen of the City of Buffalo*, 157 N. Y. 431, modifying 31 App. Div. 438.

Certiorari will not lie to review the acts of an election board in receiving votes and announcing the result, as they are final in character. The effect of an alternative writ of mandamus is to relegate to the inspectors the whole matter of canvassing the votes, and no specified directions as to how it should be directed beyond the direction that they were to follow the language of the statute. *People ex rel. Phillips v. Sutherland*, 9 App. Div. 313, 75 St. Rep. 629, 41 Supp. 181.

By § 114 the power to order a re-count and a re-canvass of the votes cast at an election by the board of canvassers is vested solely in the Supreme Court, and there is no power conferred upon the county court judicially to investigate the matter. It is doubtful whether in any event it is competent for a court to appoint a referee for that purpose. *Matter of Tompkins*, 23 App. Div. 224.

It is held, in *People ex rel. Blodgett v. Board of Canvassers of Coeymans*, 44 St. Rep. 738, 19 Supp. 206, that the court has no authority to direct a return of the ballots to the inspectors, in order that they may make a re-count or to direct that the ballots be brought into court for that purpose. The remedy for frauds or mistakes other than clerical is by proper proceedings in court or before the body to membership in which the person aggrieved is a candidate, where that board or body has the power conferred upon it to determine the qualification and election of its own members.

In *People ex rel. Bradley v. Shaw*, 133 N. Y. 493, 31 N. E. Rep. 512, 45 St. Rep. 866, it is held, upon an objection to the counting of the ballots cast at an election, that it was the duty of the inspectors to declare the result of the election, and that any objection to the ballots, upon the ground that they were marked for identification within the meaning of the act, could not be determined in this proceeding, and the court sustained an order directing a peremptory writ of mandamus to issue commanding

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the board of town canvassers to re-convene and declare the result of the town election and to issue a certificate of election to the candidates receiving the greatest number of ballots.

In *People ex rel. Hasbrouck v. Board of Supervisors*, 135 N. Y. 522, 32 N. E. Rep. 242, 48 St. Rep. 533, the law with regard to marked ballots was very fully discussed, as is also procedure by mandamus to compel inspectors to act properly. It is said that where a peremptory writ is applied for, if the facts upon which the application is based are admitted and are sufficient to authorize the writ, questions of law only are involved and the writ may issue in the first instance; otherwise an alternative writ should issue. Where a peremptory writ is issued it must demand precisely what, and no more than, the party is entitled. As the court may quash a writ in the exercise of its discretion, it is not reviewable by the Court of Appeals. Where a writ was granted without notice to the board of canvassers, and the board made no return but submitted to the jurisdiction of the court, it was held that the objection to want of notice was to be taken by the board only, and that such appearance and return rendered it too late to raise such objection.

Affidavit.

People *ex rel.* Phillips,
agst.
 Sutherland.

} 9 App. Div. 313.

STATE OF NEW YORK, }
 COUNTY OF MONROE, } ss. :

John L. Phillips, being duly sworn, says : That he is a citizen of the United States, of full age, and a resident of the village of Castile, county of Wyoming and State of New York, and has been such resident and citizen at all the times hereinafter mentioned.

That the village of Castile held its annual election on the 17th day of March, 1896. That previous to said election deponent had duly qualified in all respects as required by the laws of the State of New York as a candidate on the independent ticket at said election for the office of the president of such village, and that he was nominated for such office at the said election. That one Thomas H. Sutherland was also a candidate for said office on another independent ticket. That the said Thomas H. Sutherland and Frank Cole, Henry A. Pierce, and Ansel B. Smith constituted the board of in-

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spectors at said election, and the said Ansel B. Smith is and was the village clerk at that time. Deponent further says that said board of inspectors has omitted and neglected to discharge its duty in that among other things it refused and neglected to count certain ballots cast at said election which were by law required to be counted, and that it still refuses to do so. Deponent further says that said board has further and still so neglects to file with the village clerk of said village, or with any other officer, a certified statement of the canvass of votes duly cast at said election as required by law, and more particularly as required by § 115 of the Election Law of New York State, in that among other things it did not contain a written statement of the canvass showing the whole number of votes received for each office, the whole number cast for each person for such office written out at length in words, and at the end thereof a certificate signed by the inspectors to the effect that the statement is in all respects correct, and that the said inspectors further failed and neglected to attach to said statement one ballot of each kind voted at the election, and to state in words at full length, and written partly on such ballot and partly on the statement to which it was attached, the whole number of ballots which were received of the same kind as the one attached.

Deponent further says that on the said 17th day of March the said board did make an alleged return and certificate of canvass of the votes cast at the said election to the said village clerk, and that a duly certified copy of such return is hereto annexed and made a part of this application.

That attached to said alleged certificate of canvass and as a part thereof, as made by said board, are twenty-five ballots which were not counted by said board as required by law,

Deponent further states that according to his best understanding one of said ballots is a blank, and four of said ballots are void, while two of said ballots are in all respects correct and legal, and eighteen of the ballots so rejected are only technically defective, but not to such an extent or in such a manner as to make it impossible to determine the voter's choice therefrom.

That by the said alleged certificate of canvass it appears that the said Thomas H. Sutherland has a plurality of six of the votes cast at said election, no count being had of the twenty-five alleged defective ballots. That if the said board had counted said ballots as required bylaw to be counted, and made the proper return thereto, deponent would appear therein to have been elected by a plurality of twelve.

Deponent further states that no previous application has been made to any court or judge for a writ of mandamus, requiring said village clerk to return the alleged certificate of canvass to said board of inspectors, and requiring said board of inspectors to re-canvass said votes in the manner required by law and to make a proper and sufficient return of such canvass to the said village clerk.

JOHN L. PHILLIPS.

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Alternative Writ of Mandamus. (9 App. Div. 313.)

The People of the State of New York, on the relation of JOHN L. PHILLIPS, to THOMAS H. SUTHERLAND, FRANK E. COLE, HENRY A. PIERCE, and ANSEL B. SMITH, as board of inspectors of the village of Castile, and ANSEL B. SMITH, as clerk of the village of Castile, greeting :

WHEREAS, It appears to us by the relation and complaint of John L. Phillips that the village of Castile duly held its annual election for village officers on the 17th day of March, 1896. That said relator and the defendant Thomas H. Sutherland were each regularly qualified candidates for the office of president of said village at such election, and that they were the only candidates at such election; that the said Thomas H. Sutherland, Frank Cole, Henry A. Pierce, and Ansel B. Smith were the members of the board of inspectors of election for said village, and that Ansel B. Smith was and is the village clerk of said village;

AND WHEREAS, It further appears as aforesaid that the said board of inspectors have refused and neglected to perform the duties required by law of them, in that said board rejected and refused to count two ballots which are in all respects correct and legal, and eighteen ballots which were technically defective only, but not to such an extent as to make it impossible to determine the voter's choice, and that said twenty ballots were rejected and not included in the statement of the total number of votes cast at such election for each candidate, or for any of the candidates thereto, and that eighteen of such votes were cast for this relator; that neither of the other two votes were for either candidate for president. That the statement hereinafter referred to of said board, of the canvass, and filed with the village clerk, shows that the defendant Sutherland received six more votes than the relator, not counting the alleged defective ballots, and that had the said eighteen ballots been counted as by law required the relator would have a plurality of twelve of the votes cast at said election. That that part of § 104 of the Election Law which declares that "no ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice" was read to said board while canvassing the votes, and that they were requested to count certain of the votes rejected but refused to do so, and that the rights of the relator are prejudiced thereby, and that he has no other adequate remedy;

AND WHEREAS, It further appears as aforesaid that said board of inspectors thereafter, and on the 17th day of March, 1896, made the alleged statement of the canvass of votes of said election, and signed the same and filed it in the village clerk's office on that day. That said statement does not comply with the requirements of the law in such cases made and provided, in that it fails to contain a written statement of the canvass, showing the whole number of ballots received for each office, the whole number cast for each person for such office written out at length in words; and at the end thereof a certificate signed by the inspectors to the effect that the statement is in all respects correct, and that they further failed and neglected to attach to such statement one ballot of each kind voted at the election, and to state in words at full length and written partly on such

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ballot and partly on the statement to which it should have been attached the whole number of ballots which were received of the same kind as the one attached, and that the twenty-five alleged defective ballots were attached to said statement; and it further appearing that the said board still refuses and neglects to file another or different statement or to correct the errors above complained of:

Now, therefore, we command you, the said Ansel B. Smith, forthwith to return the said certified canvass of votes filed in your office on the 17th day of March, 1896, to the said board of inspectors for correction as hereinafter mentioned, and we command you and each of you, members of the board of inspectors as aforesaid, forthwith to re-convene and re-canvass the twenty-five alleged defective ballots attached to your statements as aforesaid.

That on such re-canvass you shall reject only such ballots as the law declares void and not to be counted. That on such re-canvass you shall not reject any ballot for any technical error which does not make it impossible to determine the voter's choice, but that every such ballot cast shall be counted in the manner prescribed by law. That upon the completion of such re-canvass you shall forthwith make and sign an amended statement in such manner prescribed by law showing the date of the election, the number of its district, the town or ward and the county in which it was held, the whole number of ballots received for each office, the whole number cast for each person for such office, and the whole number of ballots objected to because marked for indentification written out at length in words, and at the end thereof a certificate signed by the inspectors to the effect that the statement is in all respects correct.

That such statement shall be made upon a single sheet of paper, or if not so made each half sheet shall be signed at the end thereof by you. That you shall securely attach to such statement one official ballot of each kind voted at the election, and also state in words at full length and written partly on such ballot and partly upon the statement to which it is attached, the whole number of ballots which were received of the same kind as the one attached. That you shall also securely attach to such statement all official ballots, if any, which were voted, whether they shall be similar to each other or dissimilar, and all ballots objected to as marked for identification, and that you shall immediately file the same with the village clerk of the village of Castile, or that you show cause why the command of his writ should not be obeyed, and that you make return to this writ to our Supreme Court at the Wyoming County clerk's office, twenty days after service of the same upon you.

Witness: Hon. Alfred Spring, justice of the Supreme Court at the court-house in the city of Buffalo, on the 3d day of April, 1896.

E. M. JENNINGS,

Clerk.

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Affidavit.

SUPREME COURT.

The People *ex rel.* Henry Bradley and others,*agst.*Thomas G. Shaw and others, composing the
Board of Canvassers, etc.

133 N. Y. 493.

SARATOGA COUNTY, SS. :

Henry Bradley, being duly sworn, says : That he is a voter of the town of Minerva in the county of Essex, and was such during the year last past ; that on February 24th, 1892, a caucus or primary meeting of the voters was held in said town for the purpose of making nominations for town officers, which was duly organized, and a chairman and secretary duly selected, whereupon nominations were made for town officers to be filled at the town meeting in and for said town to be held on March 1st, 1892, and the following names were put in nomination.

(Insert names of candidates and the office for which each was nominated.)

That on the same day another caucus or primary meeting of duly qualified voters in said town was held in said town for the purpose of making nominations to town offices to be filled at said town meeting, which was an organized assemblage of voters representing a political party, which at the last election, before the holding of said primary meeting, and last preceding fall election, polled at least one per cent. of the entire vote cast and polled in said town, and said meeting was duly organized and a chairman and secretary thereof were duly selected, whereupon other nominations were made for town offices to be filled at said town meeting, and the following named were put in nomination to be voted for at said town meeting : (insert names of candidates and office to which nominated), whereby deponent and the relators above named were duly and regularly put in nomination for the town offices above named respectively, and were entitled to be voted for and fill said offices at said town meeting, each of them being duly qualified to fill the office for which he was nominated.

That certificates of each nomination in form and substance as provided by law were made in writing and filed with the town clerk of said town in each instance not less than five days before the day of said town meeting, and said town clerk caused to be prepared and printed two sets of ballots for said town meeting, to wit, one set of ballots containing the names of said candidates and the office to which they were nominated as first above set out, and the other set of ballots containing the names of the candidates and the office to which they were respectively nominated as secondly above set out, and on the day of said election delivered the ballots first mentioned to the inspectors of said election, but notwithstanding deponent demanded of him the delivery of said ballots secondly above mentioned to said inspectors, said town clerk refused to deliver the

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same and did not deliver the same to the inspectors of said election, and the same were not voted; but relators caused to be prepared, printed, and distributed to voters at said election, paster ballots, like the one hereto annexed, containing the names of said candidates so as aforesaid secondly put in nomination, and the offices to which they were nominated, being ballots containing the names of all the offices to be filled at said election and of the candidates therefor. Said ballots being of white paper, printed in type as required by law and in plain, black ink, and being in all respects as required by law, and said paster ballots were voted by electors at said town meeting, the same being pasted in each instance upon the ballots so delivered to the inspectors by said town clerk in the manner prescribed by law respecting the use of paster ballots, and were received by said inspectors and were by them put into the ballot boxes of said election provided for receiving the ballots for town officers at said election (the same being in each instance voted in the manner and form provided by law for the use of paster ballots and were counted and canvassed by said inspectors who were three of the defendants above named), and a return thereof made to the defendants as such board of canvassers, and said returns and ballots were canvassed by said board of canvassers and the number of votes voted at said election was ascertained by said board, and by defendants acting as said board, as well as the number cast of said ballots delivered by the town clerk to said inspectors as the number cast of said paster ballots, and it was ascertained by them the number of votes of each kind received by said candidates, and the following was declared by them to be the result of said election, and it was decided by said board and by defendants and declared that the persons next hereinafter named were elected to office at said town meeting, to wit :

(Insert names with the offices to which nominated), and the following certificate of election filed by them in the office of the said town clerk.

“ 1892. At the annual town meeting held in the town of Minerva, at Bradley's Hall, the following officers were elected for said town for the ensuing year : (insert names of candidates, office for which elected, and number of votes cast for each candidate.)

There were paster ballots cast at said town meeting which the board decided were not entitled to be allowed for the persons named as not being legally nominated, as follows: (insert of the second or other list of candidates with name of office and number of votes cast for each.)

Present at Canvass : T. G. SHAW, }
DAVID WILSON, } *Justices of the Peace.*
NELSON HYATT, }

That at said election the following number of votes were cast for the relators respectively for such offices : (being the paster ballots above named), and the number as below stated for said other candidates respectively for the same office, (being ballots so delivered by the town clerk to the inspectors) to wit : (insert names of candidates, office for which nominated, and number of votes each received.)

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That notwithstanding the relators received the largest number of votes cast at said election for the offices respectively to which they were nominated, the several persons so declared elected by said board of canvassers have assumed the duties of office respectively above named to the prejudice of the relators, and the deponent has demanded of the said William H. Sullivan possession of the office of supervisor of said town, to which deponent was elected, and has demanded of him the books and papers appertaining to said office and said position : the books and papers and said possession are refused and withheld by said Sullivan.

Deponent asks that a mandamus issue out of this court requiring defendants to re-assemble and re-count said votes and to declare the result of said election after having counted for the relators respectively the number of votes so cast for them, and called paster ballots, and directing said board and said justices to issue a certificate of election or a corrected certificate of election to the candidates having the greatest number of votes cast, including said paster ballots.

That the defendants above named are the persons composing said board of canvassers as deponent is informed and believes.

That no previous application has been made for an order or the relief asked for herein.

HENRY BRADLEY.

(Add oath or acknowledgment.)

Order to Show Cause.

At a Special Term of the Supreme Court held at the Town Hall in the village of Saratoga Springs, N. Y., March 17th, 1892 :

Present :—Hon. John R. Putnam, *Justice*.

The people *ex rel.* Henry Bradley *et al.*,
agst.

Thomas G. Shaw *et al.*, composing the Board of
Canvassers of the Town of Minerva, Essex
County, N. Y., at the town meeting held in
said town on the 1st day of March, 1892.

} 133 N. Y. 493.

Upon the affidavits of Henry Bradley and Daniel E. Wing, hereto annexed, it is

Ordered, that the above-named defendants show cause at a Special Term of this court to be held at the chambers of Mr. Justice Stover in the city of Amsterdam, N. Y., on the 22d day of March, 1892, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, why a peremptory writ of mandamus should not issue out of this court against the board of canvassers or the town officers acting as such at the town meeting of the town of Minerva, Essex County, held in said town on the 1st day of March, 1892, to wit : Thomas G. Shaw, David Wilson, and Nelson Hyatt, justices of the peace of said town, and John Mulhern, town clerk, who composed said board of can-

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vassers at said election, requiring them to re-assemble in said town as such board of canvassers, and re-count the votes cast at said town meeting, and declare the result of said town meeting after having counted for said relators respectively the number of votes cast for them, as stated in the annexed affidavit of said Bradley, called paster ballots, and directing said board and said justices to issue a certificate of election, or corrected certificate of election to the candidates having the greatest number of votes cast for them, including said paster ballots, and why the relators should not have such other and further relief or order in the premises as may be just and proper, besides costs.

Service of this order and of the papers upon which the same was made in the manner prescribed by §§ 2070 and 2071 of the Code of Civil Procedure, on or before the 18th day of March, 1892, shall be deemed sufficient service.

JOHN R. PUTNAM,
S. C.

ARTICLE V.

CORRECTION IN STATE OR COUNTY BOARD OF CANVASSERS' STATEMENTS. § 133, part of § 134.

§ 133. Correction in State or county board of canvassers' statements.

The Supreme Court may, upon affidavit presented by any elector, showing that errors have occurred in any statement or determination made by the State board of canvassers, or by any board of county canvassers, or that any such board has failed to act in conformity to law, make an order requiring such board to correct such errors, or perform its duty in the manner prescribed by law, or show cause why such correction should not be made or such duty performed. If such board shall fail or neglect to make such correction, or perform such duty, or show cause as aforesaid, the court may compel such board, by a writ of mandamus, to correct such errors or perform such duty; and if it shall have made its determination and dissolved, to re-convene for the purpose of making such corrections or performing such duty. Such meeting of the board of State or county canvassers shall be deemed a continuation of its regular session, for the purpose of making such corrections or otherwise acting as the court may order, and the statements and certificates shall be made and filed as the court shall direct and shall stand in lieu of the original certificates and statements so far as they shall vary therefrom, and shall in all places be treated with the same effect as if such corrected statement had been a part of the original required by law. A special proceeding authorized by this section must be commenced within four months after the statement or determination in which it is claimed errors have occurred was made, or within four months after it was the duty of the board to act in the particular or particulars as to which it is claimed to have failed to perform its duty.

§ 134. Proceedings of State board of canvassers upon corrected statements.

* * * The Supreme Court shall, upon application of a candidate interested in the result of such new or corrected statement, or of any elector in the county from which such statement came, and upon proof by affidavit that the same has been made and filed as herein provided, and that the State board of canvassers has neglected or refused to act thereon within the time above prescribed, require said board to act upon

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such new or corrected statement, and canvass the same as above provided, or show cause why it should not do so; and in the event of the failure of such board to act upon such new or corrected statement and canvass the same, or show cause as aforesaid, the court may compel such board by writ of mandamus to act upon and canvass such new or corrected statement, and make a statement, certificate, and declaration in accordance therewith; and if the State board of canvassers shall have made a determination, and adjourned or dissolved before receiving such new or corrected statement, the court may compel such board to re-convene for the purpose of carrying out its order and direction; and for that purpose the meeting of said board shall be deemed a continuance of its regular session. The State board of canvassers and the secretary of State shall respectively have the same powers, and discharge the same duties with reference to statements made under this section, that they have and are charged with under the provisions of §§ 139 and 140 of this act.

Where it is undisputed that the returns do not agree with the tally sheet, it is proof of "clerical mistake" within the meaning of § 132, and the duty of such inspectors being purely a ministerial one, the court has power, by a writ of mandamus to board of county canvassers, to summon the delinquent inspectors before it, and require them to amend their returns by inserting in them the results shown by the tally sheet. *Matter of Stewart*, 24 App. Div. 201.

Where a board of canvassers has been directed to make a re-canvass according to law, and has been given no specified directions in the premises, it cannot be held guilty of contempt where the canvass has been conducted in the exercise of its discretion. *People ex rel. Phillips v. Sutherland*, 9 App. Div. 313, 41 Supp. 181.

The board of canvassers may return a statement to the inspectors that they may attach a sample ballot. *People ex rel. Noyes v. Board of Canvassers*, 126 N. Y. 392, 37 St. Rep. 778 (1891). The duty of the county clerk is merely ministerial, and if the official statement of the board of county canvassers sets forth the action of the board, it is his duty to certify it and file it. *Daly v. Board of Canvassers*, 129 N. Y. 449, 41 St. Rep. 938. The State board of canvassers acts ministerially and has no power to act outside the returns and institute an inquiry as to the eligibility of candidates. *Matter of Sherwood*, 129 N. Y. 360, 41 St. Rep. 912, 29 N. E. Rep. 345.

The State board of canvassers cannot act upon anything except the certified statement required to be made. This statement cannot contain anything except whole number of votes cast, names of candidates, and number of votes re-

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ceived by each. *People ex rel. Derby v. Rice*, 129 N. Y. 461. The court ought not to grant mandamus to compel the issuance of a certificate of election to one who has no right to the position under the constitution. *Matter of Sherwood*, 129 N. Y. 360, 41 St. Rep. 912, 29 N. E. Rep. 345. The public has an interest in the result of the election, and any citizen has a right to invoke the aid of the court in compelling the board of canvassers to perform their official duties. *People ex rel. Dailey v. Rice*, 129 N. Y. 449, 41 St. Rep. 938.

The board of county canvassers is merely an administrative body and cannot exercise the judicial function of passing upon the constitution of the State, nor will the court direct the board to do what it has itself no power to do. It must confine itself to correcting errors. *Matter of Woods*, 5 Misc. 575, 56 St. Rep. 274, 26 Supp. 169, 449.

It was held, in *People ex rel. Derby v. Rice*, 129 N. Y. 461, that the Supreme Court at Special Term could not issue a writ of peremptory mandamus which is, by the force of its terms and commands, in effect an order which restrains the board of State canvassers engaged in the performance of, or about to perform, a duty imposed by statute under provisions of § 605 of the Code. (This decision is no longer in force since the amendment of chap. 946 of the Laws of 1895.)

The tally sheet, being the original entry of the casting and canvassing of a vote under the Election Law of 1896 (chap. 909), is intended by the legislature to furnish a contemporaneous official record of the actual count which shall control in case of any discrepancy between it and the clerical statement made from it by inspectors after the completion of the canvass and for the purpose of convenience.

The original statement prescribed by § 111 of the Election Law of 1896 is called an original for the reason that it is necessary to attach to it the void ballots and those protested as marked for identification; but it is not an original document in any other sense, and is a purely ministerial act of the inspectors that cannot control the tally sheet of which it is an abstract. The provision for the canvass of votes from the inspectors' statements made by § 131 of the Election Law of 1896, while it contemplates that the board of county canvassers shall act upon such statements without recourse to the tally sheets when the state-

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ments are unchallenged as to their accuracy, does not make those statements the best evidence of the final result of the election in case they are attacked for mistake or fraud.

The accuracy of tally sheets are not put in issue in this proceeding by the affidavits submitted by the appellants, as they fail to deny the allegation of the petitioners that the vote returned on the statement is different from that returned on the tally sheet. The correction of an erroneous record or mistake made and recorded in a tally sheet is provided for in the Election Law by the requirement of § 111 for preserving the boxes of voted ballots for six months and for the opening and examination under the order of the Supreme Court or a justice thereof, in order to determine the actual vote cast. When the statement or return of election district inspectors states a less number of votes for certain candidates than that shown by the unquestioned tally sheet, the board of county canvassers may be required by mandamus, on the petition of the candidates prejudiced by the return to exercise the power conferred by § 132 of the Election Law of 1896 to summon the inspectors to correct their return, and also, independently of the Election Law, the inspectors may be required, by mandamus, to convene and make a correct return, and the county board of canvassers directed to canvass the corrected return. *Matter of Stewart*, 155 N. Y. 545.

The question whether ballots before the court, with certain marks and appearances upon them, constituting undisputed evidence, are such as may or may not be counted under the statute is a question of law. Marks apparently made by the voter in attempting to correct his own errors, as, after making the cross mark in the circle, endeavoring to erase it with a rubber or some sharp instrument, or by striking the pencil through the mark, constitute an erasure or defacement rendering the ballot invalid. Ballots having the cross mark placed in the voting space before the words, "no nomination," are invalid and cannot be counted. Ballots upon which are written with pencil, in the blank column, the names of candidates whose names were already printed upon the ballots for the office, are invalid and cannot be counted. Ballots which show cross marks before the names of opposing candidates for the same single office in two different columns is to be regarded as surplusage merely, and does

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not render the ballot invalid as a ballot marked for identification. Ballots which contain cross marks in two or more of the voting circles at the head of the columns, should be counted for a candidate named for the same office on all tickets so cross marked. A ballot is not destroyed by the fact that the elector attempted to vote thereon for two or more candidates for the same office, as to which only one candidate could be voted for, but the ballot must be excluded as a vote for the particular office affected. A ballot bearing a mark made in the circle at the head of the ticket as if by a sharp instrument, not a pencil, is thereby vitiated and cannot be counted. Where there are two candidates to be elected to the office, a ballot is not vitiated by containing voting marks opposite the names of two candidates for the office in different columns but not on the same horizontal lines. *People ex rel. Feeney v. Bd. Canvassers*, 156 N. Y. 36.

Petition.

SUPREME COURT—COUNTY OF NEW YORK.

In the Matter of the Application of Perez M. Stewart and Howard P. Okie for an order directing the Board of Canvassers for the City and County of New York to perform its duty in the manner prescribed by law in the canvass of the votes cast for the office of member of assembly and member of the board of aldermen from the 19th Assembly District of the City and County of New York.	} 155 N. Y. 545.
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To the Supreme Court of the State of New York :

The petition of Perez M. Stewart respectfully shows :

First. That deponent is a citizen of the city and county of New York, residing at No. 662 West End Avenue in said city.

That deponent was a candidate for office of member of assembly from the 19th assembly district of the city and county of New York on the Citizens' Union, National Democratic, and Democracy of Thomas Jefferson tickets, and was voted for as such candidate on the official ballot on said tickets.

Second. That deponent has carefully examined the official tally sheets of the 19th assembly district filed in the office of the clerk of the city and county of New York pursuant to the provisions of the election law.

Third. That it appears by said tally sheets that deponent received the following number of votes in the following election districts in said assembly district, to wit :

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In the 7th election district.....	50 votes.
In the 8th election district.....	110 “
In the 14th election district.....	128 “
In the 17th election district.....	57 “
In the 18th election district.....	85 “
In the 19th election district.	133 “
In the 20th election district	156 “

Fourth. That as appears by said tally sheets filed as aforesaid, Solomon C. Weill, another candidate for said office of member of of assembly from the 19th assembly district on the Democratic ticket, received in the 10th election district of said assembly district 135 votes, in the 19th 69 votes, and in the 20th 86 votes.

Fifth. That in the statement and return of the votes for member of assembly from said assembly district, signed by the inspectors of election in the said several election districts above named, the following number of votes appear to have been cast for the said candidates in said districts, to wit:

For deponent in the 7th election district.....	46 votes.
“ “ “ 8th election district.....	12 “
“ “ “ 14th election district.....	112 “
“ “ “ 17th election district.....	42 “
“ “ “ 18th election district....	30 “
“ “ “ 19th election district.	130 “
“ “ “ 20th election district.....	151 “

For said Weill :

In the 10th election district.....	151 votes.
In the 19th election district.....	72 “
In the 20th election district.....	91 “

Sixth. That said inspectors of election in said respective districts have neither appeared nor been made to appear before the said county or city canvassers of the city or county of New York to explain or correct said discrepancies, and the said board of canvassers of the city and county of New York has refused to examine said tally sheets.

Seventh. That the package of ballots protested as marked for identification and voted and counted in said 8th election district contained 18 votes for deponent, and for Howard P. Okie, a candidate for member of board of aldermen, from the 19th assembly district, but said board of county and city canvassers of the city and county of New York has refused, and that the inspectors of elections for said election district have not appeared nor been made to appear before said county and city canvassers of the city and county of New York to correct the error in the said statement and return of the votes for said offices in the said 8th election district.

Eighth. That except in the 8th election district in each of the other districts mentioned a statement and return of votes cast in said district was accompanied by a sealed package purporting to contain ballots protested as marked for identification and ballots rejected as void.

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Ninth. That deponent is advised and believes it is required by the Election Law that each ballot protested as marked for identification shall be so indorsed by the inspectors of election with a statement of the mark or marks to which objection is made, and that each void ballot shall be indorsed by the inspectors of election with the reason for declaring such ballot void.

That in numerous instances the ballots in said sealed package when opened had no indorsement whatever. That in the majority of instances where they were indorsed as marked for identification the alleged identifying mark is not mentioned in the indorsement. That in most of the cases of ballots marked as void no reason for declaring said ballots void is given.

Tenth. That in the 18th election district a statement indorsed by the board of inspectors upon the sealed package of void and protested ballots is contradicted by the same inspectors in their statement and return, and both the indorsement upon the package and the contents of the statement and return are contradicted by the ballots in said sealed package, to wit: Upon the package it is stated that there are two void and three protested ballots; in the statement and return three are reported, two blank and three void votes. Among the ballots themselves there is but one blank and three indorsed as protested as marked for identification and two not indorsed at all.

That in said election district as appears by the affidavit of William Williamson, one of the poll clerks in said election district at the election held on February 2, 1897, more than fifty votes were counted for deponent and for said Okie as candidate for office of member of the board of aldermen.

Eleventh. That in the said 20th election district the package purporting to contain void and protested ballots contained no ballots at all. The statement and return to the board of inspectors for member of assembly calls for two defective ballots not counted in addition to the nine blank ballots, and for member of the board of aldermen for two defective ballots not counted in addition to the nine blank ballots.

Twelfth. And your petitioner further shows that he is advised and believes that under §§ 84 and 110 (subdivision 3) of the Election Law the said statement and return of the said election inspectors in said election districts, and the certified copies thereof are required to be made up exclusively from and based upon the figures and data shown by the tally sheets, and that said statement and return and said certified copies thereof most correspond therewith.

And your petitioner further alleges upon information and belief that when the said board of inspectors above named shall meet as required by § 132 of the said Election Law, and for the purposes specified in said section, they will be unable to correct said statements and return in such a manner as truly to show the number of votes cast for your petitioner and for the other candidates for the office of member of assembly and for said Howard P. Okie, and for the other candidates for the office of member of the board of aldermen, in said several election districts of said assembly district unless

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they shall have an opportunity to inspect the said original tally sheet.

Thirteenth. No other or former application for the relief hereby prayed for has been made to any court or judge.

Wherefore, your petitioner prays that an order may be made directed to the said board of county and city canvassers of the city and county of New York, to summon the said boards of inspectors of the said several election districts above named in the said assembly district to appear before the said board of county and city canvassers to make such corrections as the facts of the case require, and to cause their canvass of votes in said several election districts to be correctly stated, and that said clerk of the city and county of New York shall produce before said board of county and city canvassers of the city and county of New York at whatever times said boards of inspectors, or any of them, of the said election districts shall meet, for the purpose of correcting said statements and return and the copies thereof, and shall exhibit the said original tally sheets to the said board of county and city canvassers, and the said boards of inspectors for the purpose of enabling them to make such corrections in the said statements and returns, and in the copies thereof, as the facts require; and that said board of county and city canvassers shall not canvass the statements and returns from said election districts until the board of inspectors of said election district shall have met pursuant to the provisions of § 132 of the Election Law, and shall have made such corrections in said statements and returns of said canvass as the facts in the case shall require.

And in the meantime and until said corrections shall have been made, that said board of county and city canvassers be enjoined from taking further proceedings in the canvass of the votes of any candidate for the office of member of assembly or board of aldermen from the 19th assembly district of the city and county of New York, and shall neither sign nor issue any certificate of election until such corrections shall have been made in said statements and return as the facts in each case require.

Dated New York, November 18, 1897.

(Add verification hereto.)

PEREZ M. STEWART.

Order to Show Cause.

SUPREME COURT—STATE OF NEW YORK.

In the Matter of the Application of Perez M. Stewart and Howard P. Okie for an order directing the Board of County and City Canvassers of the City and County of New York to perform its duty in the manner prescribed by law in the canvass of the votes cast for the offices of member of assembly and member of the board of aldermen from the 19th Assembly District of the City and County of New York.

} 155 N. Y. 545.

Upon the annexed petition of Perez M. Stewart, verified on the

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18th day of November, 1897; the petition of Howard P. Okie, verified the 18th day of November, 1897; the affidavit of Joseph G. Deane, verified the 18th day of November, 1897; etc., etc. (insert the names of all other affiliates), let the above named, the board of county and city canvassers of the city and county of New York, or their attorney, show cause before a Special Term, Part I., of this court, held in the county court-house, in the city of New York, on the 19th day of November, 1897, at 10:30 A. M., or as soon thereafter as counsel can be heard, why a peremptory writ of mandamus or an order should not be issued out of and under the seal of this court directed to the above named, the board of city and county canvassers of the city and county of New York requiring said board to summon the inspectors of election whose names are subscribed to the statement and returns of votes for the office of member of assembly and member of the board of aldermen from the 19th assembly district of the city and county of New York in the following election districts:—the 7th, 8th, 10th, 14th, 18th, 19th, and 20th, to make such corrections in said statements and returns of votes as the facts in such cases require, and to cause their canvass of votes in the said several election districts to be correctly stated, and that the clerk of the said city and county of New York be required to produce before said board of county and city canvassers of the city and county of New York, at whatever time said boards of inspectors or any of them of the said election districts shall meet, for the purpose of correcting said statements and returns of votes and the copies thereof, and that said clerk of the city and county of New York exhibit the said original tally sheets to the said board of county and city canvassers of the city and county of New York, and said board of inspectors of the said several election districts for the purpose of enabling them to make such corrections in the said statements and returns and in the copies thereof as the facts in such case require; and it is further

Ordered, that until the determination of the motion to show cause be had, that the said board and city canvassers of the city and county of New York be, and they are hereby, restrained from making any statements of the votes cast by the voters of the said 19th assembly district, or issuing any certificate of election to the offices of member of assembly or member of the board of aldermen from the said 19th assembly district of the city and county of New York.

Due cause having been shown before me, it is

Ordered, that the service of this order to show cause on or before three o'clock on the 18th day of November, 1897, shall be deemed sufficient.

ABRAHAM R. LAWRENCE,

J. S. C.

Sufficient cause being shown:

Ordered, that service of this order to show cause on or before 9 o'clock P. M. on the 18th day of November shall be deemed sufficient.

November 18th, 1897.

A. R. L.

J. S. C.

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Order to Show Cause.

At a Special Term of the Supreme Court held at New City, Rockland County, on the 18th day of November, 1897 :

Present :—Hon. Martin J. Keogh, *Justice*.

In the Matter of the Application of John F. Feeney, a candidate voted for at the election held in Richmond County on November 2d, 1897.	}	156 N. Y. 36.
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On reading and filing the petition of John L. Feeney, verified this 18th day of November, 1897,

Ordered, that the board of canvassers of Richmond County, to wit : Hubbard R. Yetman, chairman, Edward P. Doyle, Augustus Acker, Nathaniel Marsh, and John F. Feeney, proceed to a re-count of the ballots returned to them from the various election districts in said county as objected to as marked for identification, and which purport to be cast in favor of George Cromwell ; and to a count of the ballots similarly returned to them as void and apparently cast in favor of John L. Feeney.

And to make such count and re-count in accordance with the provisions of the Election Law in the premises.

Or otherwise that said board of canvassers show cause at a Special Term of this court to be held at the court-house at White Plains, Westchester County, at 10:30 o'clock in the forenoon on Saturday, November 20th, 1897, why they should not proceed to such count and re-count accordingly.

And that upon the return day so indicated they produce before the court all the aforesaid ballots returned to them as void, or as objected to as marked for identification, for such determination as may be proper in the premises.

In the meantime and until the further determination of this court let all proceedings on the part of the said board of canvassers in regard to the statement of the results of the aforesaid election be stayed except as in said mandamus and order hereinbefore provided.

Service of this order on or before the 19th day of November, 1897, shall be sufficient.

MARTIN J. KEOGH,

J. S. C.

Petition. (156 N. Y. 36.)

To the Supreme Court of the State of New York :

The petition of John L. Feeney respectfully alleges and shows :

1. That an election was held on the 21st day of November, 1897, in all of the election districts in the various towns of Richmond County, to wit : the election districts of the towns of Middletown, Castleton, Northfield, Southfield, and Westfield, in said county.

2. That your petitioner was a candidate voted for at said election for the office of president of the borough of Richmond.

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3. That the board of canvassers of the aforesaid county are now proceeding with the canvass of votes cast at such election.

4. That although said canvass is not completed it appears that over 10,000 votes were cast at said election and that the sealed packages of void and protested ballots in each of the aforesaid election districts have been and are now before the said board of canvassers, and appear to show that an aggregate of over 300 ballots were held void by the various boards of inspectors and were not counted. And that over sixty ballots were protested and objected to as marked for identification and were counted.

5. That in each and all of the aforesaid election districts of the ballots thus held void and not counted a large proportion thereof were good and lawful ballots, cast or sought to be cast by duly qualified electors of said districts respectively.

6. That a great majority and preponderance of said ballots so held void and not counted and which were good and lawful ballots, entitled to be counted, were noticed in favor of your petitioner for the office of president of the borough of Richmond.

7. That in a great majority of cases, in the cases of ballots so held void and not counted, the grounds upon which said ballots were so declared void were not indorsed upon the back of said ballots according to law, and that your petitioner is therefore unable to state or specify the grounds upon which the respective boards of inspectors may have acted in the premises in a great majority of the cases referred to.

8. Your petitioner respectfully shows, and alleges upon information and belief, that at the aforesaid election he was duly and lawfully elected to the office of president of the borough of Richmond by a clear and substantial majority or plurality of the lawful votes of the duly qualified electors of all the aforesaid election districts; and that if the aforesaid ballots which were held void and not counted and which were good and lawful ballots in favor of your petitioner, were duly counted according to law, that the election of your petitioner to the office of president of the borough of Richmond as aforesaid would thus be clearly and duly declared.

And that by the failure to count said proper ballots the rights of your petitioner in the premises may be endangered and defeated.

9. Your petitioner further respectfully alleges upon information and belief that in respect to the protested ballots returned as objected to as marked for identification and which were counted, a large proportion thereof were improper and unlawful ballots, marked in violation of law, and reading in favor of George Cromwell, a rival candidate of your petitioner for the office of president of the borough of Richmond aforesaid, and that a large proportion thereof were not legally entitled to be counted and should have been excluded.

10. Your petitioner further respectfully shows, that both by reason of the failure in the great number of instances as hereinbefore stated on the part of the boards of inspectors, to indorse upon the void ballots the specific grounds upon which said ballots were held void and not counted, and also by reason of the very great number of ballots so returned, and the necessity of promptly making this

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application in accordance with the provisions of § 114 of the Election Law of this State, your petitioner is unable to set out at length the various circumstances and details affecting and in regard to the aforesaid ballots, in regard to which for greater particularity your petitioner prays to refer to the ballots themselves, and such other provision as may be proper according to law, in the course of these proceedings.

11. That the board of canvassers of Richmond County aforesaid consists of Hubbard R. Yetman, chairman, Edward, P. Doyle, Augustus Acker, Nathaniel Marsh, and your petitioner; and that John H. Ellsworth is clerk of said county and clerk of the said board of canvassers.

12. That the reason why an order returnable in less than eight days is asked for is that the canvass of the votes cast on the aforesaid election will be concluded before that time; and that no previous application for the relief or order prayed for herein has been made.

Wherefore, your petitioner prays that pursuant to the provisions of § 114 of the Election Law of this State a writ of mandamus issue out of your honorable court directed to the board of canvassers of Richmond County and John H. Ellsworth, county clerk of said county and clerk of said board of canvassers, requiring a count and re-count of the votes on said alleged void ballots, and also ballots objected to as marked for identification; and that under and pursuant to the provisions of said Election Law and the provisions of the law in the premises, upon said count and re-count it be determined according to law as to each ballot returned as void and not counted whether the same should not be counted in favor of your petitioner; and also upon said re-count as to each ballot objected to as marked for identification and counted for the aforesaid George Cromwell whether the same should not be excluded.

And in the meantime and until the determination count and re-count as aforesaid for an order restraining the said board of canvassers from proceeding to make any statement of the votes cast at the election without such count and re-count, and determination is duly had.

And for such other and further order or relief in the premises as may be just.

JOHN L. FEENEY,

(Add verification hereto.)

Petitioner.

Final Order.

SUPREME COURT.

In the Matter of the Application of John L. Feeney and George Cromwell.	}	156 N. Y. 36.
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These consolidated proceedings having been brought before me for trial, and having heard the proofs and allegation of the parties and the arguments of their counsel, I make the following decision:

I decide that a re-count be had of the ballots and tickets brought before me and marked for identification; that upon such re-count the following ballots and votes for president of the borough of Richmond,

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which were rejected as void, be counted and added to the vote of John L. Feeney for the office of president of the borough of Richmond, viz. : (insert the number of each ballot exhibited.)

That upon said re-count the following ballots cast for the president of the borough of Richmond, which were rejected as void, be counted and added to the vote of George Cromwell for the office of president of the borough of Richmond, to wit : (insert the number of each ballot marked as an exhibit.)

That upon such re-count the following ballots and votes thereon for president of the borough and objected to as marked for identification be excluded from the vote of John L. Feeney for such office, to wit : (insert the number of each ballot marked as an exhibit.)

That upon such re-count the following ballots and votes for president of the borough of Richmond objected to as marked for identification be excluded from the vote of George Cromwell for such office, to-wit : (insert ballots marked as exhibits.)

That all ballots marked in evidence in these proceedings, whether by number or letter, or both, not hereinbefore specified and decided upon, to be counted, added, and re-counted or excluded, are hereby decided to have been lawfully and properly counted or excluded from the canvass.

That a peremptory writ of mandamus be issued out of and under the seal of this court commanding and directing the said board of county canvassers of Richmond County in accordance with this decision.

The grounds of this decision are that the provisions of the Election Law applicable to the case require the same and the decisions upon the law.

Dated December 16th, 1897.

J. O. DYKMAN,
J. S. C.

CHAPTER XXXIII.

PROCEEDINGS UNDER TAX LAW.

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ARTICLE I. Certiorari to review proceedings of assessors.	
§§ 250-256, Tax Law.....	1234
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ARTICLE I.

CERTIORARI TO REVIEW PROCEEDINGS OF ASSESSORS.

§§ 250-256, Tax Law.

SUB. I. NATURE OF THE PROCEEDINGS AND PARTIES THERETO.

2. THE PETITION. § 250.
3. THE WRIT. § 251.
4. THE RETURN AND PROCEEDINGS THEREON. §§ 252, 253.
5. COSTS. § 254.
6. APPEALS. § 255.
7. REFUND OF TAX. § 256.

SUB. I. NATURE OF THE PROCEEDINGS AND PARTIES THERETO.

Certiorari to review assessment is not an action in any of its essential features, but is a special proceeding, is necessarily governed by the rules peculiarly adapted to such proceedings, and not by analogies of pleadings either at common law or in equity actions. *People ex rel. Dexter v. Palmer*, 86 Hun, 513, affirmed, 148 N. Y. 732.

The provisions of Article II. of the Tax Law, so far as they relate to the review of assessments by writ of *certiorari*, are substantial re-enactments of chapter 269 of the Laws of 1880. Previous to that time taxpayers who were illegally or erroneously assessed were practically without redress, it being held that assessors acted judicially, and that the writ of *certiorari* would not lie except under peculiar circumstances. It was said in *People v. Trustees of Ogdensburgh*, 48 N. Y. 390, that only an extraordinary case would justify the review on *certiorari* of the determination of assessors as to the value of property assessed. In *People v. Fredericks*, 48 Barb. 173, affirmed, 48 N. Y. 70, it was

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held that on *certiorari* to review a tax under the General Tax Law, the only questions presented were whether the assessors had jurisdiction to assess the relator and whether they had kept within their jurisdiction. That a departure from the standard of value could not be corrected on *certiorari*; so held in *People v. Delany*, 49 N. Y. 655; same rule, *People v. Commissioners of Taxes*, 46 How. 277. Although it was the rule that the sufficiency of facts disclosed in an affidavit to obtain a reduction of a tax might be examined on *certiorari*. *People v. Assessors of Albany*, 40 N. Y. 154.

The act of 1880 entirely revolutionized the law as to the right to review the action of assessors in levying assessments, and it was said, in *People v. Smith*, 24 Hun, 67, in commenting upon that act, that it was apparent from the title of the act itself that it was intended to give relief against certain wrongs, which had been long well known to exist, but which had been theretofore practically remediless; citing as an illustration of the proposition *Youmans v. Simmons*, 7 Hun, 466. Since the enactment of the statute in 1880, its aid has been very frequently invoked, and it has been fully construed by the courts and the practice under it well settled. No substantial change was made by the revision under which it was made part of the Tax Law, and the intention of the author of this work, by whom this part of the Tax Law was drafted, was, not to make changes in its provision, but to render it more concise and express somewhat more clearly what appeared to have been the original intention of the act as construed by the courts. The character of the writ has not been changed by the statutory provisions providing for a review of the assessment upon the petition of the person assessed; it is simply applied to a new purpose and modified only so far as is necessary to accomplish the review desired. While it gives redress against erroneous as well as against illegal assessments, it still contemplates an assessment made by the proper officers, which, while illegal in some respects, is not altogether void. *People ex rel. D. L. & W. v. Parker*, 117 N. Y. 86, 26 St. Rep. 698. This rule is applied in *Vandervoenter v. Long Island City*, 139 N. Y. 133.

Formerly the review of an assessment could not always be had on *certiorari*, for the writ did not review any intermediate decision, but only a final determination, *i. e.* the levy of the tax. But by the act of 1880 is given the power to review the valua-

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tion, or the legality of placing the property on the rolls. *People ex rel. Spencer v. Village of New Rochelle*, 83 Hun, 185, 31 Supp. 592, 64 St. Rep. 146. The committee of a lunatic whose real property has been illegally assessed is a person who has been aggrieved by the action of the assessors and may sue out a writ of *certiorari*. *People ex rel. Canaday v. Williams*, 90 Hun, 501, 36 Supp. 65, 71 St. Rep. 401. So, also, the owner of bank shares which appear on the bank list and are assessed in the name of a former owner. *People ex rel. Schaeffer v. Barker*, 87 Hun, 194, 33 Supp. 1042, 67 St. Rep. 728. The town clerk is not a proper party to *certiorari* to review assessment. *Matter of Winegarde*, 78 Hun, 58, 28 Supp. 1039, 60 St. Rep. 507, affirming 5 Misc. 54, 25 Supp. 48.

The court will not interfere with the assessment on *certiorari* proceedings, where the warrant for the collection of taxes has been delivered to the collector before the petition is verified. *People ex rel. Keller v. Many*, 89 Hun, 138, 35 Supp. 78, 69 St. Rep. 256. The rule that the withholding or quashing of the writ of *certiorari* to review illegal assessment is not a matter of discretion is held in *People ex rel. Comm. Mut. Fire Ins. Co. v. Tax Commissioners*, 144 N. Y. 483, since the right to the writ and appeal is expressly given by statute; and in this respect is different from the common-law writ.

But it is said, in *Matter of Seaman*, 1 App. Div. 19, 36 Supp. 748, 71 St. Rep. 679, that the General Term of the Supreme Court, as well as the Special Term, is vested with discretion with reference to granting writ of *certiorari* to review assessment.

The provisions of this act were revised from chapter 269 of the Laws of 1880 regulating the review of assessments in towns, cities, and villages by *certiorari*, and the general provisions of the Code relative to the writ are inapplicable to such cases. If the action is brought within the provisions of the special statutes the granting of the writ is not discretionary and the petitioner is entitled to it as a matter of right. *Matter of Corwin*, 135 N. Y. 245.

In *People v. Pond*, 92 N. Y. 642, an appeal from an order of the General Term which affirmed an order of the Special Term, made in proceedings by *certiorari*, under chapter 269, Laws of 1880, to review and correct an erroneous assessment, was dismissed on the ground that there was sufficient evidence to authorize the Supreme Court to exercise its discretionary power.

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The provisions of the act of 1880, chapter 269, in regard to the review and correction of assessments by *certiorari*, confers upon the court the power of review and correction only, when it appears by the return to the writ, or the evidence taken thereunder, that the assessment complained of is illegal, erroneous, or unequal. It does not authorize a review where it appears the assessment in question was made in accordance with the statutes then in force, and in the due performance of the duty then obligatory on the assessors. *People v. Commissioners of Taxes*, 91 N. Y. 593.

Where the writ was issued to review the determination of assessors after the roll had passed from their possession and control, the writ must be quashed, even though it ran also to the supervisors. *People v. Assessors*, 40 Hun, 228. No notice of the granting of the writ of *certiorari* to review an assessment of real or personal property under the act of 1880 need be given if the court, in its discretion, sees fit to dispense with it. The hearing should be at Special Term, under the provisions of this act, and the supervisor, a necessary party. It must require a return to be made thereto at a Special Term, to be held not less than ten days from the time of its allowance, but it is not necessary that the writ should be served ten days before the return day. A writ issued on the application of one assessed for real estate only may require a return as to both real and personal property. The return to the writ issued thereunder is not conclusive, but is open to contradiction, and the court may appoint a referee to take and report the evidence. *People v. Smith*, 24 Hun, 66, appeal dismissed, 85 N. Y. 628.

SUB. 2. THE PETITION. Tax Law, § 250.

§ 250. Contents of petition.

Any person assessed upon any assessment roll, claiming to be aggrieved by any assessment for property therein, may present to the Supreme Court a petition duly verified setting forth that the assessment is illegal, specifying the grounds of the alleged illegality, or if erroneous by reason of overvaluation, stating the extent of such overvaluation, or if unequal in that the assessment has been made at a higher proportionate valuation than the assessment of other property on the same roll by the same officers, specifying the instances in which such inequality exists, and the extent thereof, and stating that he is or will be injured thereby. Such petition must show that application has been made in due time to the proper officers to correct such assessment. Two or more persons assessed upon the same roll who are affected in the same manner by the alleged illegality, error, or inequality, may unite in the same petition.

A petition for the writ under this statute may be presented by

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a number of petitioners joining together, and verified by one or more; it is not necessary that each petitioner should sign the petition, the signature of an attorney being sufficient, as in case of a complaint in a civil action. *People v. Coleman*, 41 Hun, 307.

It is not sufficient to state in the petition that the relator claimed, before the assessors, that all its personal property was exempt from taxation, where it is not alleged as one of the grounds of illegality. *People ex rel. Com. Fire Ins. Co. v. Coleman*, 61 St. Rep. 70, 30 Supp. 379.

The petition to review assessment is insufficient which merely states that the relator's property is not assessed in the same proportionate value as other real estate, or because it is assessed at a higher valuation than other real estate on the roll. *People ex rel. Wechsler v. Harkness*, 84 Hun, 445, 32 Supp. 344, 65 St. Rep. 607.

It is not a sufficient specification to state that several kinds of property of the relator were overvalued in certain sums, and that the relator was entitled to a reduction in the value of certain other property. *People ex rel. Eagle Fire Ins. Co. v. Commissioners of Taxes*, 26 Supp. 941, 56 St. Rep. 641.

But where the petition alleged that the assessment was erroneous by reason of overvaluation and unequal in that it had been made at a higher proportionate value than other real property by the same assessor on the same roll, and that the petitioner would be injured by such erroneous assessment, it was held that the allegation in the language of the statute was sufficient to confer jurisdiction upon the court, to issue *certiorari*. *Matter of Nesbitt*, 3 App. Div. 171, 38 Supp. 392, 73 St. Rep. 731; see, also, *Matter of Corwin*, 135 N. Y. 246; *People ex rel. Gas Light Co. v. Barker*, 66 Hun, 21, 49 St. Rep. 428, 20 Supp. 797. The petition cannot be amended after the lapse of 15 days from the time of the completion and delivery of the assessment roll. *People ex rel. Eagle Fire Ins. Co. v. Commissioners of Taxes*, 56 St. Rep. 641, 26 Supp. 941. A petition is not sufficient which merely states that the assessment is erroneous, unequal, and disproportionate, because property is not assessed at the same proportionate value as other real property on same assessment roll, or that property is assessed at a higher rate than other property on the same roll. *People ex rel. Wechsler v. Harkness*, 84 Hun, 445, 32 Supp. 344, 65 St. Rep. 607. A petition for a writ

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of *certiorari* to review an alleged erroneous assessment on the ground of inequality, which states that the petitioner's property was assessed at 95 per cent. of its true value, and that the valuation of all other property in the town is placed only at 50 per cent., is sufficient; in such a case specific instances need not be stated. *Peo. ex rel. N. Y. C. & H. R. R. Co. v. Budlong*, 25 App. Div. 373, 49 Supp. 484, 83 St. Rep. 484.

Petition which states that the assessors have illegally and erroneously included in their valuation the market value of capital stock of said corporation, "to wit, 112 per cent. on the whole of said stock," is sufficient. *People ex rel. Equitable G. Co. v. Barker*, 66 Hun, 21, 20 Supp. 797, affirmed, 137 N. Y. 544. A petition to review an assessment which alleges that the petitioner's property was assessed at its full value and that the property of others as assessed on the tax roll does not exceed 50 per cent. of its full value on an average is not sufficient under § 250 of the Tax Law. *People ex rel. N. Y. C. & H. R. R. Co. v. Budlong*, 21 Misc. 361, 47 Supp. 765.

Where the petition alleged among other causes of error that other real and personal property upon the same roll was assessed at a less proportionate valuation than the real estate of the petitioner, but fails to specify instances of illegality and the extent thereof, *held*, that enough was stated in the petition to give the court jurisdiction to issue the writ, and that it had power to allow amendment to the petition as well as in the proceedings subsequent to the issuance of the writ. *People ex rel. Brooklyn Elev. R. R. Co. v. Assessors, etc.*, 10 App. Div. 393.

A claim for reduction cannot be heard if it was not urged as a ground of grievance before the assessors. *People ex rel. N. Y. & N. J. Tel. Co. v. Neff*, 15 App. Div. 8. Where the reason complained of was that the relator's personal property was unequally assessed, and the petition alleged that all the other assessments on the roll were made at a lower proportionate value than the assessment of the relator's property, that his assessment was wholly out of proportion to the basis of valuation adopted by the assessors in making their assessments and did not conform to the valuation and assessment as applied by them to other personal property, and the relief sought was that the assessment be corrected so as to conform to the valuations of other personal property and so as to secure equality of assessment, it was held

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that the petition was sufficient. *Matter of Corwin*, 135 N. Y. 245, 48 St. Rep. 238, reversing 46 St. Rep. 138, 19 Supp. 142.

The time allowed by the act to a party seeking to review assessment in which to apply for the writ, viz., 15 days after notice of final completion, verification, and delivery of the roll, cannot be abridged by any act or omission to act upon the part of the assessors or the common council of the city. Where no such notice has been given the time within which to apply for the writ is not limited. *Matter of Corwin*, 135 N. Y. 245. The petition on *certiorari* to review assessment is in the nature of a pleading, and only conclusions of fact need be stated, and not the evidence necessary to support them. *Matter of Corwin*, 135 N. Y. 245. A like rule was held in *People ex rel. Com. Ins. Co. v. Tax Commissioners*, 144 N. Y. 483, where it is said that while the petition for a writ of *certiorari* must specify "the grounds of the alleged illegality," only conclusions of fact need be stated, not the evidence in support thereof. S. C. 64 St. Rep. 60, reversing 83 Hun, 11, 31 Supp. 769, 64 St. Rep. 742.

A petition for *certiorari* is insufficient which merely states that the assessment is erroneous because the relator's property is not assessed at the same proportionate value as other real estate, or because it is assessed at a higher proportionate valuation than other real estate on the roll. *People ex rel. Wechsler v. Harkness*, 84 Hun, 445, 32 Supp. 344, 65 St. Rep. 607.

Petition. (152 N. Y. 430.)

The petition of the Manhattan Railway Company, upon information and belief, respectfully shows :

That on the second Monday in June, 1895, the said petitioner was and still is a railway corporation, duly created and existing, under and by the laws of the State of New York, and a resident of the city of New York, and that the principal office of the said corporation then was and still is located in the first ward of said city.

That said corporation has been assessed for taxation for the year 1895, on valuations of its real estate and personal property (the latter being assessed under the designation of capital stock and surplus profits), and its name and valuation of its real estate and personal property have been entered in the books kept by and in the office of the commissioners of taxes and assessments of the city and county of New York, required by law to be kept, and called "The Annual Record of the Assessed Valuation of Real and Personal Estate," in the said city and county for the said year 1895, in which books are also entered the valuations of other real and personal estate assessed in said city and county.

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That upon the second Monday in January, 1895, the valuations and assessments of the real estate of your petitioner made by said commissioners and appearing in said books amounted to the aggregate sum of \$15,910,900 ; and upon said day the valuation and assessment of the personal property (or capital stock and surplus profits) of your petitioner was made by said commissioners and appearing in said books was the sum of \$30,000,000.

That said commissioners between the second Monday of January, 1895, and the first day of May, advertised in one or more papers published in the city and county of New York, notices that said books were open for inspection and correction of valuations of said real and personal property (or capital stock and surplus profits) by persons considering themselves aggrieved.

That subsequently to said second Monday in January, 1895, and prior to the first day of May, 1895, your petitioner, considering itself aggrieved by the said assessed valuation of its personal estate (or capital stock and surplus profits), made an application to said commissioners pursuant to law to have the same corrected, and your petitioner was duly examined under oath by said commissioners. That your petitioner, prior to the 30th day of April, 1895, delivered to said commissioners, pursuant to law, upon a printed form or blank, provided by said commissioners, a statement, duly verified, of the condition of your petitioner for the purposes of assessment upon its personal property (or capital stock and surplus profits) on the second Monday of January, 1895, a copy of which is hereto annexed, marked Schedule "A." And your petitioner during such period duly objected to the assessment of its personal estate (or capital stock and surplus profits) made and appearing as above described, and your petitioner protested, claimed, and insisted to and with said commissioners that on the said second Monday of January, 1895, your petitioner had and owned no personal property (or capital stock and surplus profits) subject to taxation, and that it should not be assessed upon its personal property (or capital stock and surplus profits). And your petitioner duly protested, claimed, and insisted that said commissioners should omit from the said "The Annual Record of the Assessed Valuation of Real and Personal Estate," the amount inserted therein as the valuation and assessment of the personal property (or capital stock and surplus profits) of your petitioner for the year 1895 ; and also that the said commissioners should make no assessment or valuation of the personal property (or capital stock and surplus profits) of your petitioner for any purpose.

That the application of your petitioner to have such assessment corrected, and its protest, claim, and insistment above named, were for the reasons and upon the grounds that said assessment, so objected to, was erroneous and illegal, and the particulars wherein it was erroneous and illegal then assigned were substantially the same as are hereinafter specified as the particulars wherein the assessment finally made by the said commissioners is erroneous and illegal, to which specifications reference is hereby made ; and said grounds and particulars were specified by your petitioner to said commissioners.

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That the statement delivered by your petitioner as above named was duly received by said commissioners, and thereafter they caused Daniel W. McWilliams, the treasurer and secretary of your petitioner, to be personally examined before them under oath touching the condition of your petitioner on the second Monday of January, 1895, for the purpose of taxation; and thereafter and as a part of and supplemental to said examination, said commissioners caused certain questions in writing prepared by their counsel to be propounded to the said Daniel W. McWilliams, as such secretary and treasurer, and said questions were fully answered, and such answers in writing were duly subscribed and sworn to by said Daniel W. McWilliams, and were duly submitted to and received by said commissioners.

That all the questions, inquiries, and interrogatories of the said commissioners and of their counsel were fully, fairly, and truthfully answered.

That in addition to the affidavits above named submitted to said commissioners, your petitioner duly submitted to them a further statement under oath of said Daniel W. McWilliams, and also affidavits of John Waterhouse and of Frederick Zittel, touching the condition of your petitioner, on the second Monday in January, 1895, for the purpose of taxation, which further statements and affidavits contained evidence upon matters as to which the commissioners made no inquiries of your petitioner, including the matter of the valuation of its franchises.

That your petitioner duly rendered to said commissioners a full and true statement of the actual value on the second Monday of January, 1895, of all the real and personal property (or capital stock and surplus profits) of your petitioner, except that the actual value of its franchises, the exact value of which was not susceptible of being definitely and precisely stated.

That your petitioner rendered to said commissioners before the first day of July, 1895, a statement in writing certified under oath of its treasurer and specifying the matters required to be stated by and under the provisions of § 2 of title 4, chap. 13, part 1, of the Revised Statutes of the State of New York.

That by the provisions of an act of the legislature of the State of New York, passed July 1st, 1882, being chap. 410 of the Laws of 1882, and the acts amendatory thereof the said commissioners of taxes and assessments of the city and county of New York were required after the 30th day of April, 1895, to prepare assessment rolls for the respective wards of said city, containing the valuations of the real and personal property, and to certify and deliver such assessment rolls to the board of aldermen of the said city, on the first Monday of July, in said year.

That the said commissioner of taxes and assessments since the 30th day of April last, and since the valuations of the real estate and personal property (or capital stock and surplus profits) of your petitioner, and its name were entered in said "The Annual Record of Assessed Valuation of Real and Personal Estate," under and by virtue of certain acts of the said legislature, prepared the assessment rolls of said real and personal estate of the respective wards of said city,

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containing among others the name of your petitioner and the valuation of its real estate and of its personal property (or capital stock and surplus profits), which said last-mentioned assessment rolls of real and personal estate, the said commissioners of taxes and assessments have completed and delivered to the board of aldermen of said city of New York as required by law, on the first Monday in July, 1895, and that the completion and delivery of the said assessment rolls to the said board of aldermen took place on the said first Monday of July, 1895, and not before, there to remain for the period of fifteen days for public inspection.

That on or about the first Monday of July, 1895, and not before, the officer who completed the said assessment rolls and who verified the same, has given public notice by publishing in one of the newspapers published in said city, or otherwise, a notice dated on the first Monday of July, 1895, that such assessment rolls had been finally completed and had been delivered to the board of aldermen of said city, and that the said assessment rolls would remain open to public inspection, in the office of the clerk of the said board of aldermen for a period of fifteen days from the said date of said notice, to wit, the first Monday of July, 1895.

That in and by said assessment rolls, as so finally completed and verified, the names and the valuation of the real estate and of the personal property (or capital stock and surplus profits) of this petitioner are entered, and the said commissioners of taxes and assessments have therein assessed the real estate of this petitioner at the aggregate value of \$15,910,900, and the said commissioners have therein assessed, or pretend to assess, this petitioner upon its personal property, under the designation of its capital stock and surplus profits at the valuation of \$16,496,995.

And your petitioner further shows that said assessment upon this petitioner, upon the said valuation of personal property (or capital stock and surplus profits) for the purpose of taxation, and said assessment, is illegal, invalid, and void, and is erroneous; and your petitioner claims to be aggrieved thereby and will be injured by such illegal and erroneous valuation and assessment, and your petitioner specified the following grounds of illegality and error, among others:

That on the said second Monday of January, 1895, the total gross assets of every kind owned or held by your petitioner were as follows:

I. Value of structures and real property.	\$14,695,429
Value of lands, both fee and leasehold.....	5,643,335
Total... ..	\$20,338,764
Value of rolling stock....	\$4,449,990
Value of poles, machinery, etc.....	360,814
Cash.....	1,388,348
Total.....	\$6,249,052
Total assessable assets.....	\$26,587,816

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2. Franchises : Value not definitely ascertainable.

That on said day the indebtedness of your petitioner largely exceeded in amount the said sum of \$26,587,816, and that the bonded indebtedness alone of your petitioner on that day was the sum of \$37,166.035.

That all the foregoing facts appear in the statement and other affidavits rendered and submitted by your petitioner to said commissioners pursuant to law, as above set forth.

That the value of all the assets of your petitioner on the second Monday in January, 1895, was ascertained with precise accuracy and was so stated to the commissioners, except as to the value of its franchises, which did not form a subject for assessment by said commissioners.

That said statement submitted by your petitioner to the said commissioners, and all of the information furnished to them by your petitioner, as above stated, was true.

That said commissioners accepted said statement of valuations as true and correct, and did not question the same in any respect, nor require nor ask for more particularity or specifications ; and that no conflicting or other affidavits as to the value of the real estate, or of the personal property (or capital stock and surplus profits) of your petitioner was presented to said commissioners or was considered by them in arriving at such valuation or assessment or pretended assessment.

That said commissioners, nevertheless, proceeded to assess for the purpose of taxation for the year 1895, the personal property (or capital stock and surplus profits) of your petitioner, and the valuation and assessment, or pretended assessment, so made by them was, as above stated, the sum of \$16,496,995.

That in arriving at such sum or amount, as your petitioner is informed and believes, the said commissioners proceeded substantially and in effect as follows :—They added together the par value of the shares of stock of your petitioner issued and outstanding on the second Monday of January, 1895, and the sum stated as the amount of the surplus earnings of your petitioner, and from the total sum so obtained they deducted an amount equal to 10 per cent. of the par value of the outstanding shares of stock, and an amount equal to the total assessed value of the real estate of your petitioner.

In other words the said commissioners arrived at their pretended valuation and assessment of the personal property (or capital stock and surplus profits) of your petitioner by the following method, to wit:

They added together :

Par value of the shares of capital stock. . . .	\$30,000,000	
And the total amount of surplus earnings. . .	5,407,895	
		<u>\$35,407,895</u>

From this they deducted :

10 per cent. of the par value of the shares of its capital stock, to wit.....	\$ 3,000,000	
Assessed value of real estate.....	15,910,900	
Making a total deduction of.....		<u>\$18,910,900</u>
Leaving a remainder of.....		<u>\$16,496,995</u>

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The remainder so arrived at is the amount which said commissioners assessed your petitioner, and as your petitioner is informed and believes said commissioners proceeded and their action is necessarily based upon the following assumptions :

They first assumed that, because of the payment of a dividend and the statement of an amount as surplus earnings, the capital of your petitioner was unimpaired.

From this assumption they proceeded to infer that, because the capital stock was unimpaired, that value of the assets must be at least equal to the amount of the share stock at its par value, plus the surplus earnings and the outstanding indebtedness, and this amount is thus computed as follows :

Par value of share stock.....	\$30,000,000
Amount stated as surplus earnings.....	5,407,895
Amount of indebtedness.....	38,476,704

Value of assets assumed by commissioners to be..... \$73,884,595

The commissioners then assumed that all of the assets of your petitioner were subject to taxation for lawful purposes and could properly form the basis of their assessment ; or that your petitioner had and owned assets of such a character of the value, as above stated, of at least \$73,884,595.

That said theory and each and every of the assumptions above set forth are erroneous, faulty, and improper.

That your petitioner specifies the said assumptions and inferences of the commissioners and each and every of the conclusions therein as a separate and specific ground of illegality and error in the assessment herein complained of, and further cites the following grounds of error and illegality :

1. That said commissioners assume to take as the value of the real estate and personal estate of your petitioner, subject to the assessment, the total par value of its shares of capital stock, plus the amount stated by your petitioner as surplus earnings and an amount equal to its outstanding indebtedness ; that such assessments on the part of said commissioners were erroneous and illegal.

2. That inasmuch as the said commissioners were fully informed of the actual value of all of the assessable assets of your petitioner, the par value and the market value of the shares of stock issued to stockholders was immaterial, and could not lawfully be taken as a basis of assessment, as was attempted to be done by the commissioners.

3. That said commissioners were fully informed of the nature and meaning of said statement of the amount as " surplus earnings," and knew that the same did not constitute and could not be taken as a surplus within the meaning of the term as sought to be used by said commissioners, viz., in the sense of a fund or amount over and above an unimpaired capital ; but that they nevertheless proceeded upon the assumption that it bore such meaning.

4. That said commissioners did not deduct from the sum arrived at by them as the value of the assets of your petitioner on the second

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Monday of January, 1895, the indebtedness of your petitioner outstanding upon that day, and that said commissioners disregarded said indebtedness in arriving at their pretended assessment of your petitioner.

5. That said commissioners by their pretended assessment have attempted to assess as taxable assets the franchises of your petitioner; that no deduction has been made by them from the total value of the assets of your petitioner for the value of said franchises; but said commissioners have assumed that the taxable assets of your petitioner are equal in value to a sum which is composed of the value of both taxable and non-taxable assets of your petitioner.

6. That said commissioners in their pretended assessment have disregarded the uncontradicted and unimpeached evidence of your petitioner; and have attempted to assess your petitioner for its personal property (or capital stock and surplus profits) without evidence and in disregard of the facts.

7. That Edward P. Barker, Theodore Sutro, and James L. Wells are the commissioners of taxes and assessments in the city and county of New York.

Wherefore, your petitioner prays that a writ of *certiorari* may be issued and allowed by this honorable court directed to the said commissioners of taxes and assessments of the city and county of New York commanding them to certify and return to this court:

1. All and singular the proceedings above referred to had by the commissioners of taxes and assessments of the city and county of New York relating to said valuation and assessments, with the dates thereof respectively, together with that part of the record relating to the same.

2. All and singular the papers submitted by your said petitioner and filed with said commissioners, and any examination under oath or otherwise of said petitioner or any officer thereof.

3. Any other evidence or information, if any, before said commissioners or considered by them in arriving at their decision; and if there was no such evidence or information a statement to that effect.

4. A statement of the reasons for arriving at such decision and of the method adopted by said commissioners in arriving at the same, and a statement showing under what law, or by virtue of what power or authority or claim of authority and upon what evidence, and by what method, basis, or theory, such valuation or assessment was made.

5. Any and all of the documents, records, and papers, if any such there be, not embraced in the above specifications, relating to, touching, or concerning the valuation for assessment or taxation of the personal property, capital stock, and surplus profits of your petitioner, and a statement of any other matters material to the determination of the application of said petitioner.

And also if any of the allegations of fact contained in this petition be not admitted, that evidence be taken with respect thereto, and also with respect to the true value of the said personal property (or capital stock and surplus profits), or that a referee be appointed,

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and that your petitioner be permitted to give in evidence on the hearing before said referee, the matters shown to said commissioners, and that the decisions and actions of the said commissioners may be reviewed and corrected on the merits by this honorable court, and that the aforesaid errors of said commissioners may be corrected according to law, and that the said assessment upon this petitioner for and in respect of said personal property (or capital stock and surplus profits) may be set aside and vacated. And that this court will direct by a clause in said writ of *certiorari*, or by a separate order, that the question of taxes, if any, imposed under the said assessment on the said personal property (or capital stock and surplus profits) of your petitioner, be stayed pending the said writ of *certiorari* and until the further direction of this court, and that your petitioner may have such other or further relief in the premises as may be meet.

Dated New York, July 13, 1895.

MANHATTAN RAILWAY COMPANY,
By DANIEL W. McWILLIAMS,

Secretary and Treasurer.

(Add verification.)

Petition.

In the Matter of the Application of John E.
Corwin for a Writ of *Certiorari*.

135 N. Y. 254.

To the Supreme Court of the State of New York :

The petition of John E. Corwin respectfully shows to the court :

That he is a resident of and a taxpayer in the city of Middletown, Orange County, New York. That at the times hereinafter mentioned C. C. V. Ketcham, C. K. Gordon, and J. J. Duryea were and now are the assessors of said city of Middletown, and Frank Harding was and is the clerk of said city.

That said assessors between the first day of May, and the 18th day of June, 1891, proceeded to take up the taxable inhabitants and taxable property in the said city of Middletown, and prepared and completed the assessment roll of said city for the year 1891, and thereupon deposited a copy thereof with said city clerk, and on or about the 18th day of June, 1891, gave public notice, of which the following is a copy : (insert copy of notice of completion of roll, and where it may be seen and examined, and the date of which assessors will meet for review.)

That the assessment of your petitioner for personal estate was \$10,000 ; for real estate on North Street, \$5,400, and for real estate on Beattie Avenue, \$1,500, as the same appear on the assessment roll prior to the date of said meeting for review.

That at the time and place specified in said notice given by the said assessors to review their assessments, your petitioner applied for a correction and reduction of the said assessments, and through

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his attorney, William Vanamee, Esq., made an oral argument and statements before said assessors, and offered to submit to any examination that the said assessors desired to make, and among other things presented to and filed with the said assessors a verified application or statement of which the following is a copy : (here insert copy of application.)

That the statements contained in the said application thus submitted to the said assessors are true. That the said assessors refused to correct or reduce said assessment, except that they reduced the assessment upon the Beattie Avenue real estate from \$1,150 to \$1,000.

That said assessors thereafter and on the 16th day of July, 1891, completed their said assessment roll, and made and subscribed their oath thereto, and filed the same with the said Frank Harding, the said city clerk.

That thereafter the said assessors prepared a certificate or notice in reference to said assessments, which was served by mail on the 17th day of July, 1891, and of which the following is a copy (insert copy of notice by assessors of review of amount of assessment.)

That on the said 10th day of July, 1891, the common council of the city of Middletown assumed to pass a resolution confirming said assessment roll, and that thereafter and on the 17th day of July, 1891, a notice relating to the assessment of your petitioner was prepared and served by the said city clerk of which the following is a copy : (insert copy of notice of confirmation of assessment roll by common council.)

That no other notice is contemplated by the said assessors as your petitioner is informed and believes, and that said assessors have stated that they do not intend to give any other or further notice of their action in respect to said assessment roll.

Your petitioner further shows that the assessment of \$10,000 personal estate upon said assessment roll, as finally completed and verified and filed by the said assessors, is grossly and deliberately unequal, in that the same has been made at a far higher proportionate valuation than other personal property upon the said roll, and than the property of other persons whose names appear upon said roll.

That it is a fact well known to said assessors that there are many residents of said city who own taxable personal property fully equal to the property of your petitioner, and other residents who own taxable personal property exceeding the personal property of your petitioner and ranging from \$100,000 to \$300,000, whose assessments range from \$1,000 to \$3,000, or who are not assessed for personal property at all, whereas the said assessment of \$10,000 personal estate of your petitioner is the highest individual assessment upon said assessment roll by many thousands of dollars ; that the next highest individual assessment for personal property upon said roll is in the sum of \$3,000.

That though the city of Middletown is a prosperous city, containing many residents of large means and property, the entire individual assessment for personal estate upon said roll, outside of corpora-

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tions, is only \$63,600, of which said \$10,000 assessment of your petitioner constitutes nearly one-sixth.

And in respect to said assessment of \$10,000 personal estate your petitioner charges that it has been made maliciously and in bad faith, and with personal vindictiveness, and with a distinct view and intent to visit upon your petitioner a greater proportionate burden of taxation than is borne by other residents and taxpayers of said city, and with a view and intent to do wrong and injustice to your petitioner.

That your petitioner is aggrieved by said unjust and unequal assessments and will be injured thereby and will be requested to pay a greater amount and proportion of taxes than he would be required to pay if the said assessment had been made just and equal.

Your petitioner further shows that he is aggrieved and injured by the said assessment of \$5,400 upon his real estate upon North Street in said city, and by the assessment of \$1,000 upon his real estate upon Beattie Avenue in said city. That said assessments are unequal in that they have been made at a higher proportionate valuation than other real estate upon said roll.

Your petitioner further shows that all of said assessments are illegal for the reason that said assessment roll was completed and made and notice thereof given before the first day of July, 1891, and because the said assessors did not proceed in making the same in conformity to statutes.

That said assessments are illegal because the assessors have not appraised the real estate upon the said roll at the full and true value at which it would be appraised in the payment of a just debt due from a solvent debtor, but in fact have assessed it only at a fraction of said valuation, and much of it for one-fourth of said value. That the personal estate of individuals, other than your petitioner, has been assessed upon said roll at from 1-80th to 1-140th of its real amount and value.

Wherefore, your petitioner prays that a writ of *certiorari* may issue and be allowed by this honorable court commanding the said assessors to certify and return to this court their proceedings, decisions, and actions in the premises; and also to return if the real and personal property, or either, appearing on said roll, were assessed at its full and true value at which it would be applied in the payment of a just debt due from a solvent debtor, or at a percentage of such valuation, and if so at what percentage of such valuation, and requiring the said assessors and city clerk to certify and return a copy of said assessment roll.

To the end that said decisions and actions of said assessors may be reviewed and corrected on the merits by this honorable court, and the aforesaid errors of the said assessors may be corrected according to law, and that said assessments may be reduced to a proportion and rate of valuation applied to other property upon said roll and applied to other residents of said city, so that equality of assessment will be produced, and that the court will take evidence to enable your petitioner to show the unequal, unjust, and illegal assessments made against your petitioner and upon his property,

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and for such other and further relief as may be just and as the nature of the case may require.

JOHN E. CORWIN,

Petitioner.

Dated Middletown, N. Y., July 22, 1891.

(Add verification.)

SUB. 3. THE WRIT. Tax Law, § 251.

§ 251. Allowance of writ of certiorari.

Such petition must be presented to a justice of the Supreme Court or at a Special Term of the Supreme Court in the judicial district in which the assessment complained of was made, within fifteen days after the completion and filing of the assessment roll and the first posting or publication of the notice thereof as required by this chapter. Upon the presentation of such petition, the justice or court may allow a writ of *certiorari* to the officers making the assessment, to review such assessment, and shall prescribe therein the time within which a return thereto must be made and served upon the relator's attorney, which shall not be less than ten days, and may be extended by the court or justice thereof. Such writ shall be returnable to a Special Term of the Supreme Court of the judicial district in which the assessment complained of was made. The allowance of the writ shall not stay the proceedings of the assessors or other persons to whom it is directed or to whom the assessment is delivered, to be acted upon according to law.

The writ will be dismissed where it is made returnable on less than ten days' notice, and it must be returnable at a regular Special Term. *People ex rel. v. Board of Commissioners of Taxes*, 4 Misc. 504, 26 Supp. 309. On *certiorari* to review assessments it is the practice to make the writ returnable at a regular Special Term and not at chambers. *People ex rel. v. Board of Commissioners of Taxes*, 4 Misc. 504, 26 Supp. 309. The writ must be made returnable at a Special Term in the judicial district in which the assessment was made. *People v. Assessors*, 6 St. Rep. 744.

Certiorari to review assessment should be made returnable at a regular Special Term. *Certiorari* returnable in less than ten days is irregular. *People ex rel. Urquhart v. Commissioners of Taxes*, 4 Misc. 504, 26 Supp. 309. But where the *certiorari* was made returnable at the clerk's office instead of Special Term, the subsequent appearance of the parties at Special Term and a stipulation to refer the matter to a referee constitutes a waiver of the defect. *People ex rel. Paddock v. Lewis*, 55 Hun, 521, 29 St. Rep. 606, 9 Supp. 333.

Where a re-assessment of property was ordered by the Court of Appeals, the Supreme Court has power to require a return to be made for the purpose of review, although more than fifteen

 Art. 1. Certiorari to Review Proceedings of Assessors.

days have expired since the delivery of the books to the board of aldermen. *People ex rel. Man. Ry. Co. v. Barker*, 17 Misc. 497, 41 Supp. 236. Part 3, chap. 7, title 5, § 10, of the Revised Statutes, which extended the power to amend technical defects in special proceedings, was not repealed by title 1, chap. 8, Code Civ. Proc. Thus where *certiorari* to review a village assessment was made returnable at the county clerk's office instead of Special Term as required by statute, the court had power to allow the amendment *nunc pro tunc*, such being a proper exercise of discretion. *People ex rel. v. Cook*, 62 Hun, 303, 17 Supp. 546.

A *certiorari* to review an assessment by town assessors must be under seal, because the assessment is the determination of an inferior tribunal, within Code, § 2140, but the omission of a seal is amendable. *People v. Assessors of Herkimer*, 6 Civ. Pro. 297, and in same case it is held that as such assessors are not a board or body within § 2129, the writ must be directed to them by their names, but the defect of addressing them as "Assessors," etc., is amendable. For purposes of an appeal, a judgment under this act is to be considered as an order, and an appeal to the Court of Appeals must be taken within sixty days. *People v. Keator*, 101 N. Y. 610.

Order for Writ of Certiorari.

At a Special Term of the Supreme Court of the State of New York held at the court-house in the city of Brooklyn, Kings County, on the 24th day of July, 1891 :

Present :—Hon. E. M. Cullen, *Justice*.

In the Matter of the Application of John E. Corwin for a Writ of <i>Certiorari</i> .	}	135 N. Y. 245.
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On reading and filing the petition of John E. Corwin, verified the 22d day of July, 1891, and on motion of William Vanamee, attorney for said petitioner, it is

Ordered, that a writ of *certiorari* issue as prayed for in said petition, directed to the assessors and the clerk of the city of Middletown named therein :

That said writ be returnable at a special term of this court to be held at the court-house in the city of Brooklyn, Kings County, on the 10th day of August, 1891, at the opening of court on that day, and that said writ be allowed and signed and sealed by the clerk of this court.

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The court, in its discretion, dispenses with the notice of application for the writ in this matter.

Enter. E. M. C.

Enter Orange County.

Granted, July 24, 1891.

W. J. RAISEN,
Clerk.

Order for Writ.

At a Special Term of the Supreme Court of the State of New York, held in and for the city and county of New York at the Chambers at the county court-house in the city of New York, on the 13th day of July, 1895 :

Present :—Hon. Martin L. Stover, *Justice*.

People <i>ex rel.</i> Manhattan Ry. Co., <i>agst.</i> Edward P. Barker <i>et al.</i> , Commissioners of Taxes, etc.	} 152 N. Y. 430.
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Upon reading and filing the petition of The Manhattan Railway Company, duly verified on the day of July, 1895, and it appearing therefrom that there are proper grounds for the granting of a writ of *certiorari*, as therein prayed for, addressed to the commissioners of taxes and assessments of the city and county of New York, and upon motion of Davies, Stone, and Auerbach, attorneys for said petitioners, it is

Ordered, that the prayer of the said petitioner be granted and that a writ of *certiorari* issue under the seal of this court to Edward Barker, Theodore Sutro, and James L. Wells, commissioners of taxes and assessments of the city and county of New York, commanding them to certify and return to this court :

1. All and singular the proceedings above referred to had by the commissioners of taxes and assessments of the city and county of New York, relating to said valuation and assessment, with the dates thereof respectively, together with that part of the record relating to the same.

2. All and singular the papers submitted by said petitioner and filed with said commissioners, and any examination under oath or otherwise of said petitioner or any officer thereof.

3. Any other evidence or information, if any, before said commissioners, or considered by them in arriving at their decision, and if there were no such evidence a statement to that effect.

4. A statement of the reasons for arriving at such decision and of the method adopted by said commissioners in arriving at the same, and a statement showing under what law and by virtue of what power, authority, or claim of authority, on what evidence and by what method, basis, or theory said valuation or assessment was made.

5. All and all documents, papers, and records, if any such there be, not embraced in the above specifications, relating to, touching, or concerning the valuation for assessment of taxation of the personal

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property (or capital stock and surplus profits) of said petitioner, and a statement of any other matters material to the determination of the application of said petitioner.

Enter.

A Copy.

MARTIN L. STOVER,

Justice.

HENRY D. PURROY,

Clerk.

Writ of Certiorari. (135 N. Y. 245.)

The People of the State of New York on the relation of JOHN E. CORWIN *to* C. C. V. KETCHAM, C. K. GORDON, J. J. DURYEA, *Assessors of the City of Middletown, and* FRANK HARDING, *Clerk of the City of Middletown, greeting :*

WHEREAS, we have been informed by the petition of John E. Corwin that he is aggrieved and claims to be injured by the assessment of real and personal estate made by the said assessors upon the said roll for the year 1891, which roll was finally completed and verified and filed with the city clerk on the 16th day of July, 1891; and

We being willing for certain causes to be certified of the proceedings, decisions, and actions had by and before the said assessors in the matter of the assessment for taxation for the year 1891;

Do hereby command you, the said assessors, that all and singular the said assessment roll made by you for the year 1891 together with your proceedings, decisions, and actions in the premises, and all and singular the evidence, documents, records, and papers before you touching or concerning the valuation for assessment and taxation of the personal estate and real estate of the said John T. Corwin; and all and singular the evidence before you relating to the value of other personal and real estate appearing on said assessment roll, and whether all the personal property liable to taxation in said city has been assessed and appraised upon said assessment roll, together with the correct assessed value of the personal property assessed to individuals on said assessment roll; whether the said real property was assessed by you at its full and true value which it would be applied in the payment of a just debt due from an insolvent debtor, and whether the personal property was assessed at its full and true value, or if either were assessed at a less rate of valuation at what per cent. or proportion of such valuation it was assessed and placed upon said assessment roll.

And you, the city clerk, a copy of the said assessment roll for the year 1891 in your custody.

You certify and send to our Supreme Court of the State of New York at a Special Term thereof to be held at the court-house in the city of Brooklyn, Kings County, on the 10th day of August, 1891, at the opening of court on that day, together with this writ, to the end that the proceedings, decisions, and actions of said assessors in the matter of said assessment, and the assessment of the personal and real estate of said petitioner may be reviewed and corrected on the merits by our said court, and that we may further cause to be done thereupon what of right shall be fit to be done.

Witness : Hon. E. M. Cullen, one of the justices of the said

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Supreme Court at the court-house in the city of Brooklyn on the 24th day of July, 1891.

C. G. ELLIOT,

By the Court.

Clerk.

WILLIAM VANAMEE,
Attorney for Petitioner.

Writ of Certiorari. (152 N. Y. 430.)

The People of the State of New York to EDWARD BARKER and others, Commissioners of Taxes, etc., greeting :

WHEREAS, We have been informed by the petition of the Manhattan Railway Company that it is a corporation duly created and existing by and under the laws of the State of New York, and is a resident of the city of New York : that on the second Monday of January, 1895, its names and valuation of its real estate and of its personal property (or capital stock and surplus profits) were entered in the books called "The Annual Record of the Assessed Valuation of Real and Personal Estate," in said city and county for said year ; in which said books were also entered the valuations of other real and personal property : that application was thereafter and before April 30th, 1895, duly made to the commissioners of taxes and assessments of the city and county of New York, to correct the said valuation of the personal estate of said petitioner, and to strike the name of said petitioner and the said valuation of its personal property from the said books : that said application was refused and denied ; and that said commissioners have prepared assessment rolls of the real and personal property in said city, containing among other things the name of said petitioner and the valuations of its real estate and personal property (or capital stock and surplus profits).

That such assessment rolls were on the first Monday of July, 1895, and not before, completed and verified, and delivered to the board of aldermen of said city of New York, and that on or about the first Monday of July, 1895, public notice was first given by publication or otherwise, of a notice dated on that day, that said rolls had been completed and delivered to the said board of aldermen, and would remain with the clerk of the said board of aldermen for public inspection for 15 days after the date of said notice.

That the real estate of said petition was valued upon the assessment rolls at the aggregate sum of \$15,910,900, and the valuation of its personal estate (or capital stock and surplus profits) of said petitioner for the purpose of taxation entered on said assessment rolls was the sum of \$16,496,995, and said petitioner was assessed for the purpose of taxation as to its personal estate at said sum.

That the said valuation and assessment of the petitioner as to its personal property (or surplus profits and capital stock) was and is illegal and erroneous, and that said petitioner will be injured thereby.

And we being willing for certain causes to be certified of the proceedings and decisions and actions had by and before said commissioners in the matter of the valuation and assessment for taxation for the year 1895 of the personal property (or capital stock and surplus profits) of the said petitioner by them lately made ;

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Do Hereby Command You : that you serve and return under your hands to a Special Term of our Supreme Court of the State of New York at the county court-house in the city of New York, on the first Monday in October, 1895, at the opening of the court on that day, together with this writ, the following matters and facts :

1. All and singular the proceedings, decisions, and actions above referred to had by and before the commissioners of taxes and assessments of the city and county of New York relating to said valuation and assessment, with the dates thereof respectively, together with that part of the record relating to the same.

2. All and singular the papers submitted by the said petitioner and filed, or now on file, with you, and any examinations under oath or otherwise of said petitioner, or of any officer thereof.

3. Any other evidence or information, if any, considered in arriving at such decision ; and if there be none such evidence or information, a statement to that effect.

4. A statement of the reasons for arriving at such decision and of the method adopted in arriving at the same, and a statement showing under what law and by virtue of what power or authority, or claim of authority, and upon what evidence and by what method, basis, or theory such valuation and assessment was made.

5. All and any documents, records, and papers, if any such there be, not embraced in the above specifications, relating to, touching, or concerning the said valuation for assessment or taxation of the personal property (or capital stock and surplus profits) of said petitioner, and a statement of any other matters material to the determination of the application of said petitioner.

To the end that the proceedings and decisions and actions had by said commissioners in the matter of said valuations and assessments of the personal property (or capital stock and surplus profits) of said petitioner may be reviewed and corrected on the merits by our said court, and that we may further cause to be done thereupon what of right shall be fit to be done.

Witness : Hon. Charles H. Van Brunt, presiding justice of the said Supreme Court for the first department at the county court-house in the city of New York, the 13th day of July, 1895.

By the Court.

HENRY D. PURROY,

Clerk.

SUB. 4. THE RETURN AND PROCEEDINGS THEREON. Tax Law, §§ 252, 253.

§ 252. Return to writ.

The officers making a return to such writ shall not be required to return the original assessment roll or other original papers acted upon by them, but it shall be sufficient to return certified or sworn copies of such roll or papers, or of such portions thereof as may be called for by such writ. The return must concisely set forth such other facts as may be pertinent and material to show the value of the property assessed on the roll and the grounds for the valuation made by the assessing officers and the return must be verified.

253. Proceedings upon return.

If it shall appear upon the return to any such writ that the assessment complained

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of is illegal or erroneous or unequal for any of the reasons alleged in the petition, the court may order such assessment, if legal, to be stricken from the roll, or if erroneous or unequal, it may order a re-assessment of the property of the petitioner, or the correction of his assessment upon the roll, in whole or in part, in such manner as shall be in accordance with law, or as shall make it conform to the valuations and assessments of other property upon the same roll and secure equality of assessment. If upon the hearing it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or may appoint a referee to take such evidence as it may direct, and report the same to the court, with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. A new assessment or correction of an assessment made by order of the court shall have the same force and effect as if it had been so made by the proper officers within the time prescribed by law for making such assessment.

Order Denying Motion to Quash Writ.

At a Special Term of the Supreme Court held at the court-house in the city of Brooklyn, N. Y., on the 10th day of August, 1891 :
Present :—Hon. Willard Bartlett, *Justice*.

In the Matter of the Application of
John E. Corwin, etc.

} 135 N. Y. 247.

On reading and filing the petition of John E. Corwin, verified on the 22d day of July, 1891, together with all the papers and proceedings herein, and on hearing George H. Decker, attorney for the assessors and clerk of the city of Middletown, N. Y., after hearing William Vanamee, attorney for said John E. Corwin, the above-named petitioner and relator herein, it is ordered, that the motion to quash and dismiss the writ of *certiorari* heretofore and on the 24th day of July, 1891, granted herein, be and the same is hereby denied.

Enter Orange County.

WILLARD BARTLETT,
J. S. C.

Where land partially exempt is assessed below its actual value it will be presumed that the assessors assessed only so much as was not exempt. *People ex rel. Murphy v. Jewel*, 9 Misc. 647, 30 N. Y. Supp. 511.

In proceedings to review an assessment on the ground that it is excessive and burdensome the burden of proof is on the relator. *Roach v. City of Ogdensburgh*, 80 Hun, 466, 30 Supp. 450.

Where property is assessed and the owner resides within the territorial jurisdiction of the assessors, the presumption is that the assessment was lawfully made. *Matter of Peck*, 80 Hun, 122, 30 Supp. 59.

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The writ should not be limited on return to such questions only as were raised before the assessors so as to prevent a rehearing of other questions on the review. *People v. Becker*, 54 Hun, 1, 26 St. Rep. 35, 7 Supp. 101. *Certiorari* is not rendered invalid by the act of the assessors in not returning the original assessment rolls and papers, which had previously been filed with the town clerk, as return of copies under the statute was considered a compliance with the order. *Matter of Winegarde*, 78 Hun, 58, 60 St. Rep. 507, modifying 5 Misc. 54, 25 Supp. 48.

Matters not presented to the assessors on application to them for a reduction and correction of the assessment cannot be considered. *People ex rel. Hecker Mill Co. v. Barker*, 86 Hun, 148, 33 Supp. 221, 66 St. Rep. 849.

An assessment against a corporation cannot be justified on the part of the assessors because an officer refused to answer questions in regard to the corporate indebtedness where the record fails to disclose what questions such officer failed to answer or the subject to which they related. *People ex rel. Sloane v. Barker*, 76 Hun, 454, 27 Supp. 1082.

But an assessment will not be disturbed where the relator objected to the valuation of its property, but gave no evidence of its value, and it did not appear that the value of the property added to relator's deduction, would not be equal to the valuation of the commissioners. *People ex rel. Edison Gen. El. Co. v. Barker*, 74 Hun, 418.

The burden of proof is on the relator, in proceedings to review assessments on the ground of overvaluation, to show that the assessors have not assessed the property at its true value. *People ex rel. Fargo v. Murphy*, 57 Hun, 586, 32 St. Rep. 780, 10, Supp. 377, affirmed, 125 N. Y. 712.

In *People ex rel. Sheldon v. Fraser*, 74 Hun, 282, affirmed in 145 N. Y. 593, it was held that the court will strike out assessments, and not order it to be corrected, where in order to rectify their original mistake the assessors would be required to perform an illegal act. In this case the relator's bank stock was rated higher than the same stock held by others, and it appeared that in order to make the relator's assessment conform to that of the other taxpayers the assessors would have to rate the relator's bank stock below par, instead of at its full value as required by law.

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An overvaluation of personalty cannot be sustained because of an undervaluation of the realty. *People ex rel. Equitable Gas Light Co. v. Barker*, 81 Hun, 22, 30 Supp. 586, 144 N. Y. 638.

Although where it appears that the other property was assessed at a percentage value the relator's property will be required to be assessed at the same percentage. *People ex rel. D. & H. C. Co. v. Ganley*, 56 Hun, 639, 8 Supp. 563, affirmed, 131 N. Y. 566; see *People v. Zoeller*, 15 Supp. 684.

Where the petition to review assessment alleges that the assessment was illegal, erroneous, and void, upon the ground that the petitioner was not and had not been at any time during the year for which such assessment was levied the owner of any personal property in the tax district in which the assessment was levied which was the subject of taxation, a case is presented where the court is justified in appointing a referee to take evidence and report to the court. *People ex rel. Dwight v. Platt*, 92 Hun, 349, appeal dismissed, 151 N. Y. 664, on authority of *People ex rel. Ulster & Del. R. R. Co. v. Smith*, 85 N. Y. 628.

While at common law and under the Code of Civil Procedure the return to a writ of *certiorari* is conclusive upon the parties as well as upon the courts, where it is sought to review the assessments by writ of *certiorari* under the statute, and a reference is ordered to take testimony, the respondents to the writ may show in reference to the statement on the return that they have assessed the property of the relator at its true value, that the property was assessed at an amount less than its true value, and at the same rate as all the other property in the same district. *People ex rel. Dexter v. Palmer*, 86 Hun, 513, 33 Supp. 926, 67 St. Rep. 701, affirmed, 148 N. Y. 732.

The law does not require a comparison of the property on the roll to ascertain inequality, but only of the adjacent and surrounding property. *People ex rel. Allen v. Badgley*, 67 Hun, 65, 22 Supp. 26.

Assessment on capital stock will not be reduced in the absence of evidence that the party was injured thereby, although it appears that the method adopted was illegal and erroneous. *People ex rel. Equitable Gas Light Co. v. Barker*, 66 Hun 21, 20 Supp. 797, affirmed, 137 N. Y. 544. The action of the assessors in increasing an assessment does not make the whole assessment void, but merely the increase. If a claim for a reduction of 10 per

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cent. on the capital stock provided for by § 31 of the Tax Law, is not made as a ground of grievance before the assessors, it cannot be insisted upon for the first time on a review of their determination. Where physical, tangible property exists, visible to the eyes of the assessors, of a character ordinarily dealt in, and whose value is a matter of common knowledge in the community, the assessors may assess that property according to their own judgment, without seeking other proof or sources of knowledge, subject to review by *certiorari*. Such determination should stand until affirmatively proved to be wrong. *Trowbridge v. McNamara*, 18 App. Div. 17, 45 Supp. 456.

Where an adjudication had been had that the property was worth a certain sum in previous years, it was held that such adjudication was binding and conclusive upon the parties, and unless there was an increase or change in its value subsequently an objection to such assessment was untenable. *People ex rel. Warren v. Carter*, 119 N. Y. 654, 30 St. Rep. 116.

Before a taxpayer can be said to be aggrieved or claim a reduction of his assessment he must show that his property is assessed at a higher proportionate rate than property generally in the town. The assessment roll standing by itself furnishes no evidence that the assessments were illegal or unequal. *Allen v. Badgley*, 138 N. Y. 314, 52 St. Rep. 348, reversing 67 Hun, 65, 51 St. Rep. 410, 22 Supp. 26.

An allegation that the assessment was too large or that the parties assuming to act were not assessors either *de facto* or *de jure* will not justify an injunction, as the remedy by *certiorari* is entirely adequate for the first wrong and an action can lie for the other. *D. & H. C. Co. v. Atkins*, 121 N. Y. 246, 30 St. Rep. 928, affirming 48 Hun 456, 1 Supp. 80, 10 St. Rep. 332. Relief to a taxpayer who neglects to apply on grievance day for correction of assessment will not be granted on *certiorari*. *People v. Commissioners of Taxes*, 51 Hun 641, 4 Supp. 41. It seems, however, that appearance before assessors on grievance day is not a jurisdictional fact, but failure to do so is regarded as laches. *People v. Duguid*, 68 Hun, 243, 22 Supp. 988, 52 St. Rep. 190. A person will be refused relief where on his examination he refuses to state to whom he owes money. *People v. Maynard*, 7 Misc. 295, 28 Supp. 141, 58 St. Rep. 546. Assessors may refuse to reduce assessment upon refusal of a party to answer proper

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questions. *People v. Hall*, 83 Hun, 375, 64 St. Rep. 752, 31 Supp. 956.

A person aggrieved by the assessment is not precluded from reviewing the action of the assessors because when examined by them she refused to answer a question as to how many and what amounts of United States bonds she had bought during the year preceding, for which the assessment was levied, when the issue presented by the petition and argument was as to whether she had personal property in the tax district which was subject to taxation. *People ex rel. Dwight v. Platt*, 92 Hun, 349, 71 St. Rep. 562, 36 Supp. 531, affirmed, 151 N. Y. 664. *Certiorari* is properly issued to review the action of assessors, and may properly be directed to the comptroller of a city where the roll is in his possession. The return under this act is not conclusive. *People ex rel. Troy Ry. Co. v. Carter*, 52 Hun, 548, 5 Supp. 507, 24 St. Rep. 104. In *Matter of Corwin*, 135 N. Y. 246, 48 St. Rep. 238, *People ex rel. Porter v. Tompkins*, 40 Hun, 228, was disapproved so far as it may be construed to hold that the writ cannot be issued in any case after the assessors have parted with the roll. The provision that the person must appear before the assessors on review day and state his objection does not apply to a non-resident who is assessed for personalty by the assessors. His failure to appear before them does not bar him of his remedy by writ of *certiorari*. *People ex rel. Paddock v. Lewis*, 55 Hun, 521, 29 St. Rep. 606, 9 Supp. 333. A tax assessment cannot be reviewed by *certiorari* upon grounds not called to the attention of the tax commissioners. *People ex rel. Eagle Fire Ins. Co. v. Commissioners*, 56 St. Rep. 641, 26 Supp. 941. Nor where the party claiming relief has failed to apply to the commissioners or assessors while the assessment roll is under their control by appearing on grievance day and objecting thereto. *People ex rel. Western U. Tel. Co. v. Dolan*, 32 St. Rep. 599, 11 Supp. 35.

Where a writ was quashed on the ground that the relator appeared on the day appointed for hearing grievances by attorney and not in person, no objection being made by the assessors to receiving and filing the attorney's affidavit connected therewith, it was held that the decision was error. *Matter of Corwin*, 135 N. Y. 246, 48 St. Rep. 238. The party aggrieved by an assessment may act by agent who has sufficient knowledge of the facts to

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present proofs when the party is absent from the city or confined by illness, and so is prevented from making application within the time limited. *People ex rel. New York Hotel & R. Co. v. Barker*, 140 N. Y. 437, 55 St. Rep. 796. The fact that the assessment roll sought to be corrected was not in the possession of the assessors when the writ was issued is not material. *People ex rel. West Shore R. R. Co. v. Adams*, 125 N. Y. 471, 36 St. Rep. 166.

Where the relator did not appear before the board on grievance day and object to the assessment, but relied upon unofficial information that the assessment was the same as the year preceding, it was held that by laches it had lost its right to avail itself of the writ of *certiorari*; that as the board had jurisdiction to assess but had adopted an erroneous principle of assessment, the case was rather one of over-valuation than of a void assessment. It also held that where no notice was published as to the final completion of the roll, the limitation of the time prescribed within which a party aggrieved might sue out a writ of *certiorari* did not apply. *People ex rel. West Shore R. R. Co. v. Adams*, 125 N. Y. 471, 36 St. Rep. 166. As to when a reference will be granted, see *People v. Coleman*, 48 Hun, 602, 1 Supp. 112; *People ex rel. N. Y. L. E. & W. R. R. Co. v. Zoeller*, 15 Supp. 684.

On the issue made as to whether the relator had personal property subject to taxation, a referee may be appointed to take evidence and report. *People ex rel. Dwight v. Platt*, 92 Hun, 349, 36 Supp. 531, 71 St. Rep. 562. Where the assessors decided adversely to the application of a railroad company for a re-assessment, and the return shows that the assessors refused to hear the testimony offered by the company, a reference will be ordered. *People v. Zoeller*, 15 Supp. 684.

The act of 1880 giving a remedy by *certiorari* to review and correct an illegal or excessive assessment does not permit a party complaining of an assessment, who has omitted to avail himself of the opportunity provided by statute to remedy his grievance after the assessment has been confirmed by lapse of time, to arrest the collection of the tax by a proceeding under said act. *People v. Commissioners of Taxes*, 99 N. Y. 254. It is held, in *People v. Commissioners of Taxes*, id. 157, that it is essential to the support of a claim under this statute to reduce or nullify an assessment made by the proper officers, that it should be made to appear affirmatively by sufficient proof that such assessment is

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in part or as a whole erroneous. Citing *People v. Davenport*, 91 N. Y. 581. If the evidence fails to show this or leaves the matter in doubt, it is the province of the assessors to determine the value and amount of the property liable to taxation.

The act of 1880 does not apply to assessments for local improvements, but to a tax imposed upon the whole body of taxpayers for some general purpose of taxation. The objection to a writ issued to review a local tax is not waived by a return to it as the defect goes to its very foundation, nor will the fact that a motion to quash the writ has been denied prevent the objection. *People v. Common Council*, 38 Hun, 7.

The writ will not lie under the act of 1880, unless the party applying therefor has first made application, provided by the statute, to the board of assessors for relief. *People v. Wall Street Bank*, 39 Hun, 529, citing *People v. Mutual Union Telegraph Company*, 99 N. Y. 254. But this question must be raised at Special Term. *People v. Hicks*, 2 St. Rep. 294.

It is proper in such a case to admit in evidence conveyances of other property, as establishing presumptively the prices for which it sold, and also estimates of value for the purpose of obtaining loans and insurance. Objections made before the referee must be renewed before the court, or they will be deemed waived. An order of reference in proceedings by *certiorari* under act of 1880, to review and correct an alleged illegal, erroneous, or unequal assessment, or an order refusing to set aside such an order of reference, is not reviewable in the Court of Appeals; neither order is final nor involves a substantial right under the Code of Procedure, § 190. *People v. Smith*, 85 N. Y. 628. The proceeding under the statute is, by its language, confined to the person or corporation assessed and claiming to be aggrieved. A corporation cannot review under it a tax imposed upon the stockholders, because the tax would be against the persons who were stockholders in the corporation, and they were the only persons who could be aggrieved by the tax. *People v. Coleman*, 2 St. Rep. 615. The provisions of the act of 1880 are not affected by the Code. *People v. Low*, 40 Hun, 176.

The provisions of the act of 1881, in reference to the powers of assessors of the city of Albany, does not prevent a review of their action under the act of 1880, in determining the value of real estate used for business purposes, for the purposes of taxa-

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tion under this act. The cost of creating it may be considered, yet the more controlling consideration is its earning capacity. *People v. Weaver*, 34 Hun, 32, appeal dismissed, 99 N. Y. 659. Same rule is held in *People v. Pond*, 13 Abb. N. C. 1, and also that if the assessment roll and affidavit are not returned, the court may presume that the affidavit conformed to the statute in respect to the statement of the rule of valuation; also, the form of denial in return considered. In *People v. Keator*, 36 Hun, 592, it was held that under this act, on review of value of real estate, it is proper to make the test of the value of the property for assessment for the purposes of taxation, to consist in its earning capacity rather than the cost of its construction, not as an absolute test, but as an element, and a safer and more just guide; especially so of a railroad, when the road is of small value as compared with its cost; and in such cases the General Term will not reverse the determination of the Special Term on the question of value, unless the finding is clearly opposed to the preponderance of evidence. See *People v. Hicks*, 2 St. Rep. 294.

The strict rules of evidence will not be applied in cases arising under this act, and a decision will not be reversed for improper admission of evidence, unless it can be seen that it influenced the determination. In reviewing an assessment of real estate where the referee, although finding the assessment roll illegally prepared, makes no finding of fact which shows the illegality, the court has no power to strike the whole tax from the roll, although the counsel for the assessors consents thereto. See this case also as to when a great increase in the assessment, an increase from \$200,000 to \$1,000,000, will be considered to show malice in the assessor making the later assessment. *People ex rel. Rockefeller v. Haight*, 24 Misc. 425.

Return.

NEW YORK SUPREME COURT—CITY AND COUNTY OF NEW YORK.

People ex rel. The Manhattan Ry. Company,

agst.

Ed. Barker and others, as commissioners, etc.

} 152 N. Y. 430.

To the Supreme Court of the State of New York :

Edward P. Barker, Theodore Sutro, and James L. Wells, the com-

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missioners of taxes and assessments, respectfully return, to the writ of *certiorari* hereto prefixed and issued out of this court on the 13th day of July, 1895, as follows :

Your respondents, Theodore Sutro and James L. Wells, return as to them and each of them, that your respondent, Theodore Sutro, qualified as a commissioner of taxes and assessments on the 10th day of June, 1895 ; and that your respondent, James L. Wells, qualified as a commissioner of taxes and assessments on the 13th day of June, 1895, and that as to them and each of them, except in so far as the matters herein returned are matters of record, that this return is made on information and belief.

Between the first Monday in September in the year 1894, and the second Monday in January, 1895, the deputy tax commissioners of the city of New York, under the direction of the commissioners of taxes and assessments, assessed all the taxable property in the several districts of said city that were assigned to them respectively for that purpose, and furnished to the commissioners, under oath, a detailed statement of all such property ; that said deputies had examined personally each and every house, building, lot, pier, or other assessable property, giving the street and ward, map number of such real estate embraced within said districts, together with the name of the owner or occupant, if known ; also, in their judgment the sum for which such property, under ordinary circumstances, would sell, with such other information in detail relative to personal property or otherwise, as the commissioners of taxes and assessments may from time to time require, and the assessed valuation of all and any such property within the city of New York were duly entered in detail in books provided for that purpose by the comptroller, and kept in our office in the city of New York, called "The Annual Record of Assessed Valuation of Real and Personal Estate." The deputy tax commissioners appointed to that duty, under direction of the commissioners of taxes and assessments, between said times duly assessed the personal property, exclusive of bank shares, of the relator herein, for the year 1895, at the sum of \$30,000,000, and duly entered such assessment in the said books, and thereafter notice of such assessment was sent to said relator.

Said books were kept open in our office for examination and correction from the second Monday in January, until the first day of May, 1895, and previous to and during the time said books were open for inspection, the fact was duly advertised according to law. During said times the said books were open to public inspection, as above stated, application was made by the relator to have the assessed valuation corrected. Thereupon the said relator submitted to the said commissioners of taxes and assessments, and filed in our office, a statement in writing, of which a copy, marked "Schedule A," is attached and made a part of this return.

That thereafter the commissioners of taxes and assessments examined one Daniel W. McWilliams with reference to the statements of facts and the amounts set forth in the application theretofore filed with the commissioners and hereby attached as Schedule "A," which examination, together with the affidavits of one John Waterhouse

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and one Frederick Zittel, verified the 29th day of May, 1895, are hereby attached and made part of this return, and marked respectively "A 1," "A 2," "A 3," and "A 4."

Thereupon the commissioners of taxes and assessments, having before them the application filed and the examination taken upon said application for the reduction or cancellation of the assessment against it for the year 1895, examined into the complaint so made by the relator, and considered such application, examinations, and affidavits, and fixed the amount of such assessment at the sum of \$16,496,995, which they believed to be just, and which they decided to be the sum for which the personal property of the relator was lawfully assessable for the year 1895, and thereupon the said assessment theretofore entered in the said books of annual record was finally decided and corrected in accordance with their said decision. A copy of said assessment as it appears upon the said books of Annual Record, marked Schedule B, is hereto annexed, and made part of this return.

The figures erased on said schedule indicate the amount of the original assessment made by the deputy tax commissioner.

Thereafter the commissioners of taxes and assessments caused to be duly prepared from said books of annual record assessment rolls for each of the several wards of the city of New York, annexed to each of said rolls were certificates that the same were correct in accordance with the entry in the books of said record, and on the first Monday of July, 1895, the rolls thus certified were delivered by them to the board of aldermen of the city of New York at the city hall in said city.

And we further return, in obedience to the paragraph numbered "second" of the writ of *certiorari* herein, that the several exhibits herein referred to and hereto attached and made part of this return are all and singular the papers submitted by said petitioner and filed or on file with us, all examinations under oath or otherwise of said petitioner or any officer thereof upon any application made by the relator for the reduction or cancellation of the assessment against its personal property for the year 1895.

And we further return that the method by which the commissioners made their assessment for the purposes of taxation upon the personal property of the relator for the year 1895 was as follows :

At the time that the respondents fixed the assessment against the personal property of the relator at the sum of \$16,496,995, they had before them, and considered, a certain report made by the officers of the Manhattan Railway Company to the Railroad Commission, and which report was transmitted to the legislature on the second day of January, 1895, and which they were advised and believe was competent evidence to be considered by them, and that any statements therein contained were to be treated by them as admissions made by the relator.

That in such report the relator itemized its total gross assets and fixed them at the sum of \$72,787,217.13, and reported its liabilities at the sum of \$37,164,019.10, leaving the said relator at the time that the said report was made, as we ascertained from said report,

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possessed of actual, tangible assets, over and above its liabilities, in the sum of \$35,623,197.38.

We further ascertained from said report that the relator stated its capital stock at the sum of \$30,000,000, and an existing surplus on the 30th day of June, 1894, in the sum of \$5,623,197.38, so we concluded we were justified in determining that the relator, at the date of said report, was possessed of actual, tangible assets, over and above all liabilities, in the sum of \$35,623,197.38.

The commissioners had before them also and considered a statement filed with them by the above-named relator upon its application for a reduction or cancellation of the assessment against it for the year 1893, and the commissioners were further advised and informed by the records in their office had upon that application that it then admitted its liability to, and assented to an assessment against its personal property in the sum of \$12,529.915.

The commissioners had also before them the application filed by the relator for the reduction or cancellation of the assessment against its personal property for the year 1894, and of all proceedings had thereon, and ascertained and determined that the statement made in 1893 and the statement made in 1894 disclose no substantial difference in the condition of the relator for the purposes of assessment against its personal property, with the exception that the amount of surplus disclosed in 1894 was nearly \$1,000,000 in excess of that reported in 1893, and the commissioners attach hereto and make a part of this return all of the proceedings had by the relator looking to the reduction or cancellation of the assessment against it for both the years 1893 and 1894, which proceedings, affidavits, and documents are marked respectively Schedule "C" and Schedule "D."

The commissioners further ascertained on the examination hereinbefore referred and hereto attached as Schedule "A," that the statement made by the Manhattan Railway Company to the New York Railroad Commissioners hereinbefore referred to was a true statement.

And the commissioners further ascertained from the exhibit attached hereto and herewith returned as "A," that the traffic of the company between June 30, 1894, and the second Monday of January, yielded a profit above operating expenses and fixed charges.

The commissioners further ascertained from the said Schedule "A," and determined the fact to be, that the capital stock paid in as returned by the relator at the sum of \$30,000,000, representing money or its equivalent, actually paid for real estate, and the building construction and equipments of the elevated railroads of the relator, and from said exhibit that their money, or its equivalent, had been invested in such real estate amounting to the sum of \$49,072,807.25, and that such sum represented the actual value of the real estate of the relator and represented property over and above the value of any franchises owned by the relator, and that the capital stock of the relator remained unimpaired.

The commissioners further ascertained and determined that notwithstanding the claim of the relator that the sum returned by it as

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the amount of its surplus earnings at the sum of \$5,407,995, did not, in fact, represent the sum composed of assets realized from the profits remaining undivided and subject to division at the option of the directors, and an additional sum by the way of assets to the unimpaired capital, that nevertheless the relator had theretofore, under the statute, claimed the right to have 10 per cent. of its capital stock deducted upon the ground that the said sum did represent the surplus referred to under the statute as the sum therein defined as surplus profits or reserve fund exceeding 10 per cent. of its capital stock after deducting the assessed valuation of its real estate, and all shares of stock in other corporations actually owned by such company.

The commissioners therefore upon all the facts hereinbefore returned, ascertained, and determined the fact to be that the capital stock of the relator paid in or secured to be paid in, to wit, the sum of \$30,000,000, remained and was on the second Monday of January, 1895, unimpaired, and they therefore proceeded as required by statute to deduct from the capital stock and surplus of the relator, being the sum of \$35,407,895, 10 per cent. of the capital stock, to wit, \$3,000,000, the assessed value of the real estate of the relator, \$15,910,900, a total of deductions from the capital and surplus of the relator of \$18,910,900, and assessed the actual, tangible assets of the relator subject to taxation at \$16,496,995.

And the commissioners further return that except as herein above stated they deny the allegations in the petition upon which the writ was granted, numbered 1, and the commissioners further return that so far as the allegations in the petition upon which the writ was granted contained in paragraph No. 2 are allegations of fact, they deny the same; so far as the same are conclusions of law they submit themselves to the court; and the commissioners further return that as to the allegations of the petition contained in paragraphs marked 3, 4, 5, and 6 of the petition upon which the writ herein was granted contain allegations of fact they deny the same, and in so far as the said paragraphs contain conclusions of law they submit themselves to the court.

With regard to the statements contained in said writ and the petition upon which the same was granted and the fact that said assessment is erroneous by reason of the over-valuation, or is illegal in that it had been made at a higher proportionate valuation than other real and personal property on the same rolls, or that the said assessment upon any of the grounds specified in said petition as illegal, erroneous, or void were served and returned upon information and belief that each and every of such statements are untrue.

In witness whereof we have hereunto subscribed our names this 18th day of October, 1895.

EDWARD P. BARKER,

THEODORE SUTRO,

Commissioners of Taxes and Assessments.

(Add verification.)

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Order of Reference.

At a Special Term of the Supreme Court of the State of New York, held in and for the city and county of New York at the county court-house in said city, on the 27th day of December, 1895 :

Present :—Hon. Edward Patterson, *Justice*.

People *ex rel.* The Manhattan Railway Com-
pany,

agst.

Edward P. Barker *et al.*, as Commissioners of
Taxes, etc.

} 152 N. Y. 430.

A writ of *certiorari* to review the assessment of taxes for the year 1895 of the above-named relator having duly been issued from this court on the 10th day of July, 1895, the same having been duly served on the defendants above named, and said defendants having thereafter on or about the 20th day of October, 1895, filed their return to said writ of *certiorari*, and the issues arising therefrom having been duly brought on to be heard.

Now, upon reading and filing the said return of the said commissioners, the said writ of *certiorari*, the order directing the issuance of the same, with the petition on which the same was granted, and after hearing Julien T. Davies, Esq., of counsel for said relator, and James M. Ward, Esq., of counsel for defendants, and due deliberation being had, and it appearing to the court that testimony is necessary for the proper disposition of the matter, it is

Ordered, that it be and hereby is referred to Lawrence Godkin, Esq., a counsellor-at-law of the State of New York, to take and report to this court with all convenient speed the evidence upon the several matters in issue, and particularly as to the following :

1. The actual value of the real estate of the relator, The Manhattan Railway Company, on the second Monday of January, 1895.

2. The actual value of the personal property and assets other than real estate and franchises of the relator, The Manhattan Railway Company, on the second Monday of January, 1895 ; and it is further

Ordered, that upon the coming in of such referee's report this cause be placed by the clerk of this court upon the day calendar as a preferred cause, for the first Monday following the filing of said report, and that the issues therein be again brought on for trial *de novo* before the justice who may then be holding said Special Term of this court.

All questions of law and questions arising upon the admissibility of particular evidence are reserved and are to be disposed of on final hearing.

EDWARD PATTERSON,

Enter.

J. S. C.

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Order of Reference. (135 N. Y. 245.)

At a Special Term of the Supreme Court, held at the court-house in the city of Brooklyn, Kings County, on the 10th day of August, 1891 :

Present :—Hon. Willard Bartlett, *Justice*.

In the Matter of the Application of John E. Corwin, etc. }

Proof of service having been made of the writ of *certiorari* granted in the above-entitled matter on the 24th day of July, 1891, returnable on this 10th day of August, 1891, together with a copy of the petition on which it was granted and also of the order directing the writ to issue, and the relator herein having appeared by William Vanamee, Esq., his counsel, and the defendants having appeared by George H. Decker, Esq., their counsel, and the defendants having made a motion to quash said writ, and said motion having been denied, and the defendants having made and filed their return to said writ, it appearing to the court that testimony is necessary for the proper disposition of the matter,

Ordered, that it be and it hereby is referred to John F. Bradner, Esq., of the city of Middletown, N. Y., to take and report to this court with all convenient speed evidence upon the several matters in issue, and particularly if the assessment of the relator's real estate and personal property is unequal, and if the said assessment has been made at a higher proportionate valuation than the real estate and personal property of other persons whose names are upon the assessment roll referred to in the said writ and in the said return thereto. And it is further

Ordered, that the first hearing under this order be held at the office of the said referee in the said city of Middletown on the 17th day of October, 1890, at 10 o'clock in the forenoon of that day, and that the referee shall have power to adjourn from time to time as justice may require.

Granted August 29th, 1891.

W. J. KAISER,
Clerk.

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Order Dismissing Writ.

At a Special Term, Part III., of the Supreme Court in and for the county and city of New York, held at the county court-house in said city, on 22d day of April, 1896 :

Present :—Hon. Roger A. Pryor, *Justice*.

People *ex rel.* The Manhattan Railway Com-
pany,

agst.

Edward P. Barker, *et al.*, as Commissioners,
etc.

152 N. Y. 430.

The above-named relator having sued out a writ of *certiorari* to review the proceedings of the respondent herein in assessing for the purpose of taxation the personal property of said relator for the year 1895 at the sum of \$16,496,995, and these proceedings having been duly argued before Hon. Roger A. Pryor, at a Special Term, Part III., of this court on the 19th day of March, 1896,

Now, on reading and filing the petition for said writ of *certiorari*, verified the 13th day of July, 1895, the order for the writ dated the 13th day of July, 1895, the writ of *certiorari* issued the 13th day of July, 1895, and the return thereto filed on the 22d day of October, 1895, and on reading the order filed herein December 30, 1895, referring this cause to Lawrence Godkin, Esq., to take testimony and report the same to this court, the report of said referee filed herein the 27th day of February, 1896 ; and the testimony of the witnesses Daniel W. McWilliams, Edward F. J. Gaynor, John Waterhouse, Frederick Zittel, and Joseph Henry Adams, taken before said referee, and the exhibits annexed to said report, and after hearing Julien T. Davies, Esq., of counsel for the relator, in support of said writ, and James H. Ward, of counsel for respondents, in opposition thereto, and due deliberation having been had, on motion of Francis M. Scott, counsel of the corporation, it is

Ordered, that said writ of *certiorari* be and the same hereby is dismissed, and said proceedings of the respondents herein be and they are hereby in all respects confirmed with costs to the respondents.

ROGER A. PRYOR,

Enter.

Justice Supreme Court.

Report of Referee.

(Title.)

To the Supreme Court :

I, McDonald Van Wagoner, referee appointed by the court to take evidence in the above-entitled case, brought to review the assessments of the years 1892 and 1893, do respectfully report that I have been attended by the attorneys of the respective parties, Peter Canfine for the relator, and A. S. Newcomb for the defendants, and have taken all the evidence offered by the respective parties in said cases,

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and herewith report the same with all other proceedings had before me as such referee.

Dated October 16, 1894.

McD. VAN WAGONER,
Referee.

Findings by Court on Evidence.

SUPREME COURT—ULSTER COUNTY.

The People of the State of New York on the relation of the President, Managers, and Company of the Delaware & Hudson Canal Company, Plaintiff,

agst.

Zachariah Roosa, Philip A. Ayres, and Peter E. Jansen, as Assessors of the Town of Marbletown in the County of Ulster, Defendants.

A writ of *certiorari* having been granted at a Special Term of the Supreme Court on the 9th day of September, 1892, returnable on the 23d day of September, 1892, to review the assessment of the real estate of the President, Managers, and Company of the Delaware & Hudson Canal Company, in the town of Marbletown, for the year 1892, said writ having been duly served, and the defendants having appeared on the return day named in said writ and procured time until October 7, 1892, to make and file their return, and having made and filed their return, and an order of reference having been made to McDonald Van Wagoner, October 7, 1892, to take and report the evidence, and the said referee having taken and reported the evidence, and the proceeding having been brought on to a trial at a Special Term of this court, held at the Supreme Court chambers in the City Hall in the city of Kingston, Ulster County, N. Y., on the 1st day of November, 1894, and after hearing A. S. Newcomb, of counsel for the defendants, and Peter Cantine, of counsel for the plaintiff, and mature deliberation had thereon, the court doth make its decision, and finds the following facts: (Here follow findings of facts.)

I find as conclusions of law:

First. The said assessment of \$180,000 on the relator's real property in said town was erroneous by reason of over-valuation, and was also unequal in that it was made at a higher proportionate valuation than the other real estate on said roll made by said assessors, and that by reason thereof the relator has been required to and has paid the sum of \$2,446.46 in excess of what the tax would have been if its said real estate had not been erroneously and unequally assessed, and had been assessed at the same proportionate valuation that the other real estate was assessed on said roll.

Second. That the plaintiff have judgment, that there be audited and allowed to the President, Managers, and Company of the Delaware & Hudson Canal Company, and included in the next annual tax levy of said town and county, the sum of \$2,446.46, with inter-

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est thereon from March 1, 1893, and that the same be paid over to said President, Managers, and Company of the Delaware & Hudson Canal Company.

Third. No costs are allowed, and judgment is hereby ordered in conformity to this decision.

SAMUEL EDWARDS,
Justice of the Supreme Court.

Exception to Findings.

(Title.)

The defendants herein make and file the following exceptions to the findings herein made by the justice, and filed August 4, 1895.

First. To so much of the first conclusion of law as finds that the assessment of \$180,000 on relator's real property in the town was erroneous by over-valuation.

Second. To so much of said first finding of law as holds that said assessment was also unequal in that it was made at a higher proportionate valuation than the other real estate on said roll made by the assessors.

Third. To so much of the said first conclusion of law as holds that the relator has been required to and has paid the sum of \$2,46.446 in excess of what the tax would have been if its real estate had not been erroneously and unequally assessed, and had been assessed at same proportionate valuation as other real estate on the roll.

Fourth. To the whole of said first conclusion of law.

Fifth. To the second conclusion of law and to the whole thereof.

A. S. NEWCOMB,
Attorney for Defendants.

Judgment.

SUPREME COURT—ULSTER COUNTY.

The People of the State of New York on the relation of the President, Managers, and Company of the Delaware & Hudson Canal Company, Plaintiff,

agst.

Zachariah Roosa, Philip A. Ayres, and Peter E. Jansen, as Assessors of the Town of Marbletown, Defendants.

Judgment, August 4, 1895.

This proceeding having been brought on to trial and hearing, and the court having made and filed its decision: Now, on motion of Peter Cantine, of the firm of P. & C. F. Cantine, the plaintiff's attorneys, it is ordered, adjudged, and decreed, that the President, Managers, and Company of the Delaware & Hudson Canal Company—for brevity hereinafter called the relator—during the year 1892, and for many years prior thereto, was the owner of, operated, and maintained in good order a canal from tide-water at Eddyville,

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in the county of Ulster, and State of New York, to Honesdale, in the State of Pennsylvania, a distance of one hundred and eight miles, and which for the distance of four miles runs through the town of Marbletown.

That the total of all the assessments of real property in said town of Marbletown, made by the assessors for the purpose of taxation and appearing on the assessment roll for the year 1892, was the sum of \$824,800, and the total of all the assessments of personal property on said roll was the sum of \$12,025.

And it is further ordered and adjudged, that the said assessors assessed and valued all the real estate on said assessment roll at .447 per cent. of the true and full value at which it would be appraised in the payment of a just debt due from a solvent debtor, July 1, 1892, except the relator's real estate assessed on said roll, which is of the value hereinafter adjudged. And that the personal property assessed on said roll was assessed at its full value.

And it is further ordered and adjudged, that the total amount of taxes levied on all the assessments of real and personal property on said roll was the sum of \$14,677.02, and that the tax levied on said assessment of \$180,000 on the relator's said real estate in said town was the sum of \$3,151.01.

And it is further ordered, adjudged, and decreed, that the said assessment on the relator's said real estate of \$180,000 should have been \$33,078 to have made it equal, and at the same proportionate valuation that the other real estate on said assessment roll was assessed.

And it is further ordered, adjudged, and decreed, that by reason of such over-valuation, as well as by reason of said unequal and higher proportionate valuation, the President, Managers, and Company of the Delaware & Hudson Canal Company were compelled to and did pay a tax levied on such assessment of \$3,157.01, which was \$2,446.46 in excess of what the tax would have been if its said real estate had not been assessed erroneously and unequally, and had been assessed at an equal and not at a higher proportionate valuation than the other real estate on said assessment roll was assessed.

And it is further ordered, adjudged, and decreed, that there be audited and allowed to the President, Managers, and Company of the Delaware & Hudson Canal Company, and included in the next annual tax levy of said town and county, the sum of \$2,446.46, being the excess of what the tax would have been if its real estate had not been assessed erroneously and unequally, and had been assessed at an equal and not a higher proportionate valuation than the other real estate on said assessment roll was assessed, with interest thereon from the 1st day of March, 1893, the time it was paid, and that the same be paid over to the said President, Managers, and Company of the Delaware & Hudson Canal Company.

JACOB D. WURTS,
County Clerk.

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SUB. 5. COSTS. Tax Law, § 254.

§ 254. Costs.

Costs shall not be allowed against the officers whose proceedings may be reviewed under any such writ unless it shall appear to the court, that they acted with gross negligence or in bad faith or with malice in making the assessment complained of. If the writ shall be quashed or the prayer of the petitioner denied, costs shall be awarded against the petitioner, not exceeding the costs and disbursements taxable in an action upon the trial of an issue of fact in the Supreme Court.

Under § 3253, an additional allowance may be granted, except in the first and second judicial districts, in a special proceeding, by *certiorari* to review an assessment.

Costs must be awarded on denying the petition. The Special Term has no discretion. *People v. Jones*, 6 St. Rep. 112. Where the assessors refused to allow a clergyman his exemption, and his affidavit that he is such is clear and uncontradicted, they should be charged with costs of *certiorari* proceedings to review their action. They cannot act upon hearsay or their own preconceived notions, and if they do so they are chargeable either with gross negligence or intentional wrong within chapter 269, Laws of 1880, allowing costs to be charged against them in such case. *People v. Peterson*, 16 Week. Dig. 70. On *certiorari* proceedings to review an assessment under statute of 1880, costs will not be awarded against the assessors unless it is found that they have acted in bad faith in making the assessment. *People v. Keator*, 67 How. 277, on appeal, 36 Hun, 592. The statute (Laws of 1880, chap. 269, § 6) only relieves the assessors from costs upon the hearing at Special Term on return to the *certiorari*. An appeal from the determination there made is a different matter subsequently provided for and directed to be heard and determined in like manner as an appeal from an order. § 7.

In such a case costs are to be given or withheld in the discretion of the court. § 3239. *People v. Aston*, 1 St. Rep. 37. Where repeated decisions have been made holding certain property exempt from taxation, it is the duty of assessors to leave the property off the roll; if they again include it they may properly be charged with costs, although an appeal was pending from the first decision. *People v. Fonda*, 22 Week. Dig. 477.

Costs on appeal in these proceedings, when allowed against assessors or other officers in review of their proceedings, must be

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taxed as costs on appeals from orders under § 3239 of the Code. *People ex rel. Oakfield Cemetery v. Pratt*, 66 Hun, 578, 50 St. Rep. 355, 21 Supp. 853; *People ex rel. Bleecker & Fulton Sts. Ry. Co. v. Barker*, 90 Hun, 253, 35 Supp. 803, 70 St. Rep. 264. In *People ex rel. Lee v. College Point*, 89 Hun, 194, 34 Supp. 1145, 68 St. Rep. 878, it is said that \$50 is allowable in the discretion of the court, but where that discretion is not exercised that sum will not be awarded in a bill of costs.

Where it appears that the assessors were actuated neither by gross negligence, bad faith, nor malice, and the amount of reduction granted is less than contended for, costs will not be taxed against the assessors. *People ex rel. N. Y., L. E. & W. R. R. Co. v. Zoeller*, 15 Supp. 684. In the absence of proof that the assessors were negligent to a gross degree, or acted in bad faith or maliciously, no costs will be allowed against them. *People ex rel. Lorillard v. Barker*, 72 Hun, 637, 55 St. Rep. 207, 25 Supp. 393; *People ex rel. Niagara Falls H. P. Co. v. Russell*, 57 Hun, 53, 32 St. Rep. 20, 10 Supp. 391. Where the property of a railroad company was assessed at one place at its full value and in another at 40 per cent. of its value, the court will order a ratable revision of the assessment. *People ex rel. N. Y. L. E. & W. R. R. Co. v. Zoeller*, 15 Supp. 684.

SUB. 6. APPEALS. Tax Law, § 255.

§ 255. Appeals.

An appeal may be taken by either party from an order, judgment, or determination under this article as from an order, and it shall be heard and determined in like manner as appeals in the Supreme Court from orders. All issues and appeals in any proceeding under this article shall have preference over all other civil actions and proceedings in all courts.

When the appellate division has unanimously affirmed an order dismissing upon the merits a writ of *certiorari* to review an assessment, the Court of Appeals has no jurisdiction to review the facts which are alleged to show existence of grounds for granting the writ; nor can the Court of Appeals examine the opinion of the court below to ascertain the grounds of its decision. *People ex rel. Broadway Imp. Company v. Barker*, 155 N. Y. 322. In *People v. Coleman*, 107 N. Y. 541, 12 St. Rep. 315, it is held that the question of valuation will not be considered by the Court of Appeals where it is a matter of judgment merely.

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To the same effect, *People ex rel. R. R. Co. v. Hicks*, 105 N. Y., 198, 7 St. Rep. 359.

When the only question raised on *certiorari* to review an erroneous assessment or an unequal assessment is, in effect, whether in the affidavits before the assessors there was sufficient to justify them in making the assessment at the figure in question; and when a re-assessment is ordered by the Special Term, and this order is confirmed by the appellate division, it must be assumed that both of these courts decided the question adversely; and as the ordering of a re-assessment is proper under the statute, it raises no question of law for review by the Court of Appeals. *People ex rel. Brewing Co. v. Assessors of Brooklyn*, 154 N. Y. 437, affirmed, 19 App. Div. 596. Upon appeal to the Court of Appeals, findings of fact determining in equality of the relator's assessment cannot be reviewed, the only inquiry is whether there was legal evidence tending to the conclusion arrived at and whether there were any errors of law affecting the decision. Where the assessment was not returned, a comparison having been made of all the property in the town used for similar purposes with that in question, such property having been selected from the roll by stipulation of the parties, and no claim was made on the hearing that this did not fairly represent the general rate of assessment, or that they furnished an inadequate basis of comparison, *held*, that the question could not be raised on appeal, that it was to be assumed that the property so selected had been a fair representation and so served as a correct basis of comparison. *People ex rel. Eckreson v. Christie*, 115 N. Y. 158, distinguishing *People ex rel. Warren v. Carter*, 109 N. Y. 576, 16 St. Rep. 367.

Section 9 of Article VI. of the Constitution, prohibiting a review by the Court of Appeals of a unanimous decision of the appellate division, where there is evidence supporting a finding of fact, applies to proceedings by *certiorari* to review assessment for taxes, and an appeal to the Court of Appeals can only be taken on questions of law. *People ex rel. Manhattan Ry. Co. v. Barker*, 152 N. Y. 417. It seems that the provisions of the New York Consolidation Act, providing for a review by *certiorari* of decisions of the commissioners of taxes, does not authorize the court to review the decisions of those officers on questions of value or appraisal where they proceeded upon information or

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evidence supporting their decision. *People ex rel. Edison Ill. Co. v. Barker*, 139 N. Y. 55, 54 St. Rep. 444. An order quashing a writ of *certiorari* is appealable to the Court of Appeals. *People v. Tax Commissioners*, 144 N. Y. 483. But where the assessment involves a question of fact, and there is some evidence to support the determination of the assessors as to the true amount of the assessment, the Court of Appeals will not review and reverse such determination upon *certiorari*. *People ex rel. Mills v. Barker*, 147 N. Y. 31, 69 St. Rep. 337. An order denying a motion to reduce assessment and directing referee to take proof of the value of the property is of an interlocutory nature and is not appealable to the appellate division. *People ex rel. Trowbridge v. McNamara*, 18 App. Div. 17, 45 Supp. 456.

The right to review an assessment for taxation in New York City is confined to grounds of illegality and over-valuation. *People ex rel. Broadway Im. Co. v. Barker*, 14 App. Div. 412, 43 Supp. 1015, 77 St. Rep. 1015. For the purposes of an appeal a judgment in proceedings by *certiorari* to review an assessment under the act of 1880 is to be considered as an order, and an appeal to the Court of Appeals must be taken within sixty days, being the time prescribed by law for taking appeals from orders. It is said that it was the intention of the legislature that the proceedings should be brought to a speedy termination, and that they should be so conducted as to reach a decision in time for the action of the board of supervisors on the rolls for the year. *People v. Keator*, 101 N. Y. 610; *People v. Fonda*, 22 Week. Dig. 477.

SUB. 7. REFUND OF TAX. § 256, Tax Law.

§ 256. Refund of tax paid upon illegal, erroneous, or unequal assessment.

If in a final order in any such proceeding it shall be ordered or adjudged that the assessment complained of was illegal, erroneous, or unequal, and such order shall not be made in time to enable the assessors or other officers to make a new or corrected assessment for the use of the board of supervisors, then at the first annual session of the board of supervisors after such correction there shall be audited and allowed to the petitioner and included in the tax levy of such town, village, or city, made next after the entry of such order, and paid to the petitioner, the amount paid by him, in excess of what the tax would have been if the assessment had been made as determined by such order of the court, together with interest thereon from the date of payment. In case the amount deducted from such assessment by such order exceeds ten thousand dollars, so much thereof as shall be refunded by reason of such corrected assessment, other than the proportion or percentage thereof collected for such town, village, or city

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purposes, shall be levied upon the county at large and paid to the petitioner without further audit. The board of supervisors shall audit and levy upon such town, village, or city, the proportion or percentage of such excess of tax collected for such town, village, or city purposes, which shall be collected and paid to the petitioner without other or further audit.

ARTICLE II.

MISCELLANEOUS PROVISIONS IN RELATION TO ENFORCEMENT OF TAX LAW. §§ 257-261, Tax Law. § 16, County Law.

SUB. 1. APPLICATION TO COUNTY COURT TO APPORTION TAX. § 257.

2. APPLICATION TO COUNTY COURT WHERE TAXPAYER HAS REMOVED FROM COUNTY. § 258.
3. SUPPLEMENTARY PROCEEDINGS TO COLLECT TAX. § 259.
4. POWER OF COUNTY COURT WHEN COLLECTOR FAILS TO PAY OVER. §§ 260, 261.
5. APPLICATION TO COUNTY COURT TO REFUND TAX. County Law, § 16.

SUB. 1. APPLICATION TO COUNTY COURT TO APPORTION TAX. § 257, Tax Law.

§ 257. When county court may apportion tax.

When the premises of one person shall have been wrongfully assessed and taxed in with the premises of another, the person aggrieved thereby may, upon application to the county court of the county in which the property is situated, on petition duly verified, and on eight days' notice to the assessors of the town in which the premises are situated, and to the party whose premises are included in such wrongful assessment, have such assessment and tax apportioned by such county court. The county court shall take such evidence as may be necessary to determine the facts, and shall fix and specify the amount of the assessment and tax properly chargeable to the petitioner's property, and to the other party chargeable therewith. The collector of the town, upon receiving a copy of the order of the county court, shall forthwith change the assessment roll and tax to conform to such order, and shall receive the amount apportioned upon the premises of the petitioner in full for the tax upon such property.

SUB. 2. APPLICATION TO COUNTY COURT WHERE TAXPAYER HAS REMOVED FROM COUNTY. § 258, Tax Law.

§ 258. Application to county court where taxpayer has removed from the county.

If it shall satisfactorily appear by affidavit to the county court of any county that a tax legally levied therein, except upon real property of non-residents, cannot be collected because of the removal of the person taxed to any other county of the State, such court shall, upon application of the collector of any tax district or of the county treasurer of the county, grant an order, directed to the sheriff of the county where such person may be, to collect the same out of his personal property, with interest at the rate of eight per centum per annum from the date of said order. Such order shall be filed in the office of the clerk of the county in which it is granted, and a certified copy thereof delivered to the constable or sheriff of the county where the person liable for the tax may be, and such constable or sheriff, on receiving the same, shall execute it, and make a like return, and be entitled to the same fees and subject to the same liabilities and penalties for neglect as upon execution from any court of record. The sheriff receiving such moneys shall pay the same to the county treasurer of the county where

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it was levied, to the credit of the town in which it was assessed. This provision shall also apply to taxes levied upon rents reserved as upon personal property where such taxes remain unpaid.

SUB. 3. SUPPLEMENTARY PROCEEDINGS TO COLLECT TAX. § 259, Tax Law.**§ 259. Supplementary proceedings to collect tax.**

If a tax exceeding ten dollars in amount levied against a person or corporation is returned by the proper collector uncollected for want of personal property out of which to collect the same, the supervisor of the town or ward, or the county treasurer or the president of the village, if it is a village tax, may, within one year thereafter, apply to the court for the institution of proceedings supplementary to execution, as upon a judgment docketed in such county, for the purpose of collecting such tax and fees, with interest thereon from the fifteenth day of February after the levy thereof. Such proceedings may be taken against a corporation, and the same proceedings may thereupon be had in all respects for the collection of such tax as for the collection of a judgment by proceedings supplementary to execution thereon against a natural person, and the same costs and disbursements may be allowed against the person or corporation examined as in such supplementary proceedings, but none shall be allowed in his or its favor. The tax, if collected in such proceeding, shall be paid to the county treasurer or to the supervisor of the town, and if a village tax, to the treasurer of the village. The costs and disbursements collected shall belong to the party instituting the proceedings, and shall be applied to the payment of the expense of such proceeding. The president of a village and a county treasurer shall have no compensation for any such proceeding. A supervisor shall have no other compensation except his per diem pay for time necessarily spent in the proceeding.

In an application for an order requiring a resident of the county against whom taxes exceeding in amount \$10 had been returned by the collector unpaid to appear and be examined concerning his property, the affidavit need only allege facts set up in the section, and need not allege facts sufficient to show that the assessors or supervisors had jurisdiction to impose the tax in question. *Matter of Conklin*, 36 Hun, 588.

It was held, in *Bailey v. Buell*, 59 Barb. 158, where proceedings had been commenced under a like statute and a taxpayer had been ordered by the county judge to pay the tax, that the payment "was not in any just or legal sense a voluntary payment." This was reversed, 50 N. Y. p. 663. See *Drake v. Shurtliff*, 24 Hun, 422, upon the power of the county court to order such payment, and as to whether such payment is voluntary or can be recovered back.

It is competent for a person against whom supplementary proceedings have been instituted for the collection of taxes, *ex parte*, to move for a dissolution of the order for his appearance and examination on the ground that it was improvidently granted, and

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where such motion and the question as to whether the party proceeded against was a resident of the county was in issue, *held*, that the question was reviewable in the Court of Appeals. *Bassett v. Wheeler*, 84 N. Y. 466.

In the proceedings under this statute it appeared that the taxpayer was the owner of the land assessed and the only person bearing that name who resided in the county. The assessors testified that the taxpayer was shown the assessment roll and that he admitted the assessment against his land was correct; *held*, that the taxpayer could not claim that he was misled by the addition of the word "Est." to his name on the roll. *In re Hartshorn*, 17 Supp. 567, 44 St. Rep. 16.

In a proceeding to collect a tax assessed upon real estate, where the taxpayer has been ordered to appear before the county judge for examination, he cannot show that he has sufficient personal property out of which the collector could make taxes. But if he wishes to rely upon that defence he should make a motion to vacate the order after notice based upon affidavits showing facts upon which he relies. *In re Hartshorn*, 17 Supp. 567, 44 St. Rep. 16.

Chapter 79 of the Laws of 1898 provides, "that neglect or refusal to pay taxes shall not be punishable as a contempt or as misconduct, and that no fine shall be imposed for such non-payment, nor any person be imprisoned or otherwise punishable on account of such non-payment of any tax or of any fine imposed for refusal to pay such taxes. Provided that the act shall not apply to proceedings supplementary to execution upon a judgment recovered for taxes.

SUB. 4. POWER OF COUNTY COURT WHEN COLLECTOR FAILS TO PAY OVER. §§ 260, 261, Tax Law.**§§ 260. Power of county court when collector fails to pay over.**

If any collector shall neglect or refuse to pay over the moneys collected by him, to any of the persons to whom he is required to pay the same by his warrant, or to account for the same as unpaid, the county court, on proof of such fact by affidavit, on application of the county treasurer, shall make an order directed to the sheriff of the county, commanding him to levy such sum as shall remain unpaid by such collector out of his property, personal and real, and pay the same to the county treasurer, within sixty days from the date of such order. The sheriff shall cause the same to be executed, and pay to the county treasurer the money levied by virtue thereof, deducting for his fees the same compensation that the collector would have been entitled to retain. If the whole sum due from the collector, or if a part only, or if no part

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thereof, shall be collected, the sheriff shall state the fact in his return, which shall be made as in the case of an execution, and the county treasurer shall give notice to the supervisor of the town, city, or division thereof, of any amount which may remain due from such collector. If the sheriff shall neglect to execute the order or to pay over the money collected thereon, within the time limited thereby, he shall be liable therefor as in case of an execution, and the county treasurer shall immediately prosecute such sheriff and his sureties for the sum due from him, which sum when collected shall be paid to the county treasurer.

§ 261. Payment of moneys collected.

The county treasurer shall pay over the moneys received from the sheriff upon such order in the manner directed by the warrant to the collector. If the whole amount of moneys due from the collector shall not be collected on such warrant, or otherwise, the county treasurer shall first retain the amount which ought to have been paid to him before making any payment to the town officers.

Section 260 is a substantial revision of the statute as it stood, except that it renders it necessary that the county court shall, upon application of the county treasurer, make an order directing the sheriff to collect the moneys remaining unpaid from the collector upon proof being made by affidavit. Under the former statute the county treasurer issued a warrant for their collection without any action on the part of the court. The act requires the county treasurer to issue warrant against a delinquent town collector under § 206. This is directory only, and the issuance of a warrant after the expiration of that time is valid as the foundation of an action against the collector's sureties. It seems that the issuance and return of the warrant by the county treasurer is a condition precedent to the maintenance of a suit by the supervisors against a collector or his sureties on his official bond. *Looney v. Hughes*, 26 N. Y. 514.

SUB. 5. APPLICATION TO COUNTY COURT TO REFUND TAX.

County Law, § 16.

**§ 16 of the County Law. Correction of assessments and return-
ing and refunding of illegal taxes.**

Any such board may correct any manifest clerical or other error in any assessment or returns made by any one or more town officers to such board, or which may or shall have properly come before such board for its action, confirmation, or review; and cause to be refunded to any person the amount collected from him of any tax illegally or improperly assessed or levied, and upon the order of the county court, it shall refund any such tax. In raising the amount so refunded or necessary to supply the deficiency caused by the correction of any error in such assessment, such board shall in the same or next ensuing tax levy, adjust and apportion such amount upon the property of the several towns and wards of the county as shall be just, taking into consideration the portion of the State, county, town, and ward included therein,

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and the extent to which such town or ward has been benefited thereby. Such board shall ascertain, fix, and determine the amount to which any person or corporation is equitably entitled to receive back from any town for taxes paid while the boundary lines between the towns was in dispute and cause the same to be levied and collected.

It is said in *Matter of Gilloren*, 16 Misc. 130, that the statute as it now stands is a revision of the statutes previously existing, and has been upon the statute books in substantially the same form for more than twenty-five years; that its construction and application has long been the subject of contention in the courts and that the decisions are not entirely harmonious. It finds place in this work for the reason that the tax, or any improper assessment or levy, can only be reviewed upon an order of the county court. It is therefore a matter of procedure in the courts and a special proceeding. In *Matter of Buffalo Mutual Gas Light Co.*, 144 N. Y. 228, it was held that the county judge has no authority or control over the action of the assessors or other officers or bodies empowered to make assessments and to levy and make assessments, except such as is expressly given by statute. The only power given to that court by § 16 of the County Law is to direct the refunding of illegal taxes that had been paid. This does not carry with it by implication the power to cancel taxes before their payment, or to restrain their collection. It was held that an order of the county judge was void which directed the board of supervisors of a county to cancel taxes illegally imposed upon a corporation by action of the board in extending taxes for State purposes, and for the assessment of which the corporation was not liable, and restraining their collection. It seems that no application was made for the correction of the error and no correction made while the board was in session, therefore its power was ended and could not be called into action again until the payment of the taxes, and that until application to have it refunded had been made to the board, the county court had no power to make an order on the subject.

This case lays down the true meaning and application of the statute and discusses it very fully.

The provisions of § 16 of the County Law were intended for the benefit of a party who pays illegal taxes voluntarily as well as one who pays under duress, and it is a general provision for the benefit of any one from whom illegal taxes have been collected. The application of a taxpayer for a review of illegal

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taxes paid by him is informal and not governed by any established rules of procedure. All that is required to be shown is that the county through its proper officers has collected from the party the tax illegally or improperly assessed or levied. *Matter of Adams v. Supervisors*, 154 N. Y. 619, affirmed, 18 App. Div. 415.

An order of the county court granted on notice to the board of supervisors, recommending the board to correct an erroneous assessment and to refund to the party assessed the amount erroneously assessed, is mandatory, and upon failure of the board to appeal has the same legal effect as a judgment. Mandamus will lie against the board in case of refusal to comply therewith. *People ex rel. Pells v. Board of Supervisors*, 65 N. Y. 300, reversing 63 Barb. 83.

In *Matter of Hermance*, 71 N. Y. 481, it is said that the statute was not intended to and does not subject all assessments to review or permit corrections of all errors, but simply of those which are "manifest," *i. e.* apparent by an examination of the assessment roll or not needing extrinsic evidence to make that fact clear: some error of form in the assessment roll, not an error of the assessors in making it, nor any substantial error of judgment or of law.

In that case it was also held that the county court had no power under the amendatory act to order a board of supervisors to refund taxes paid by the applicant, alleged to have been illegally assessed. Distinguishing and limiting *People ex rel. Pells v. Supervisors*, 65 N. Y. 300.

This was followed by the *Matter of New York Catholic Protective*, 77 N. Y. 342, holding that under a similar statute, where a tax, clearly illegal, had been collected, the county court has power to order the board of supervisors to refund the amount so collected; that it is not essential to the exercise of this power that the assessment shall have first been adjudged illegal by some competent tribunal. Overruling *In re Hudson City Sav. Inst.*, 5 Hun, 612, distinguishing and limiting *Matter of Hermance v. Supervisors*, 71 N. Y. 481.

In *William v. Board of Supervisors of Wayne County*, 78 N. Y. 561, it is held that where an assessment was made upon property which by law is exempt from taxation, it is illegal, and the county court has power under this statute to order the super-

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visors to refund the amount of tax so illegally assessed. Reversing 14 Hun, 343, where cases are cited and followed, *Matter of Gilloren*, 16 Misc. 130.

In the *Matter of the Application of Harris v. Supervisors*, 33 Hun, 279, it was held that an application for a review of taxes illegally and improperly assessed and levied, is an order made in a special proceeding and as such is reviewable upon appeal under § 3257 of the Code. It is said that the act refers to the tax itself rather than to the method of making the assessment or levy, and to an illegal rather than to an erroneous assessment or levy of taxes. The act must be assumed to have intended to confer upon the county court power to strike from the assessment rolls uncollected taxes levied without authority of law. *Matter of Douglas*, 48 Hun, 318.

It was held, in *Matter of Ulster County Savings Bank*, 20 Hun, 481, that the statute authorizes an application to the county court to have an assessment stricken from the roll, where there was an entire want of jurisdiction of the assessors to assess the property in question.

In the *Matter of Farmers' Nat. Bank of Hudson*, 1 T. & C. 383, it was held that a motion to deduct the assessed value of the real estate of a bank from the valuation of its stock is not a "manifest or other clerical error" to be granted in these proceedings.

In the *Matter of Peck*, 61 St. Rep. 802, 80 Hun, 122, 30 Supp. 59, it was said "that none of the cases cited to the court hold that the county court has power under the provisions of the statute in question to compel the restoration of the taxes based upon an assessment when the assessors had jurisdiction to make the assessment."

Petition.

IN COUNTY COURT.—COUNTY OF MONROE.

In the Matter of the Application of Delbert A. Adams, executor, etc., for an Order of the Court directing the Board of Supervisors of Monroe County to refund certain taxes paid by him, etc.	} 154 N. Y. 619.
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The petition of Delbert A. Adams, your petitioner, respectfully shows to the Monroe County court :

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That your petitioner resides in Brockport, N. Y., and is the sole acting executor of the last will and testament of Mrs. Lydia M. Wilcox, deceased. That she died about seven years ago, and at the time of her death was the owner of a farm of about 131 acres of land, with a dwelling-house and barns thereon, situated in the town of Ogden, Monroe County, N. Y. That after her death and in the year 1891 the said farm was assessed by the assessors of the town of Ogden to "Est. Mrs. L. M. Wilcox" for the sum of \$57.67, taxes for that year. That the farm was sold upon August 16th, 1892, by the Monroe County treasurer to Messrs. Brewster, Gordon & Company to recover said tax. That the said farm was assessed in the year 1892 by the assessors of the Town of Ogden to "H'rs L. M. Wilcox" for the sum of \$71.76 tax for that year. That the farm was sold again upon August 15th, 1893, by the Monroe County treasurer to Messrs. Brewster, Gordon & Company to recover the taxes. That the farm was assessed in the year 1894 by the assessors of the town of Ogden to "Est. Mrs. L. M. Wilcox" in the sum of \$75.21, the tax for that year, and was sold August 20th, 1895, by the Monroe County treasurer to Messrs. Brewster, Gordon & Company to recover the tax.

That the farm was assessed in 1895 by the assessors of the town of Ogden to "Mrs. L. M. Wilcox Est." in the sum of \$71.77, the tax for that year. That the total amount of taxes assessed for the said four years as above stated was \$276.41. That the taxes for said years amounting to the sum of \$276.41 was paid to the Monroe County treasurer, J. B. Hamilton, Esq., on the 28th day of April, 1896, except that the tax for the year 1895, \$71.77, was paid May 29, 1896, and receipts from the county treasurer now in possession of your petitioner for said payments as above set forth were delivered by the county treasurer at the time of said payments. That all of said payments were made after the sales of the farm as above, except the farm was not sold for the taxes for the year 1895. That in the month of January, 1896, this petitioner, who has the power of the sale under the will of Mrs. Wilcox of the said farm, desired to dispose of the farm to one Ernest Webster, who desired to purchase the same, and at that time upon making an abstract of title of the farm, for the first your petitioner discovered that said taxes for said years were unpaid, and that the farm had been sold for taxes as above stated, and upon January 25th, 1896, your petitioner gave notice to Messrs. Brewster, Gordon & Company, the purchasers, at the tax sales of said farm, that on February 5th, 1896, at 10 A. M., at the county treasurer's office, an application would be made to the county treasurer to have the sale of said farm cancelled on the ground that the assessment of said farm as above stated were absolutely void, and that the sales of said farm conveyed no right or title to the purchaser at said sales.

That the application to have the sales cancelled was opposed by Messrs. Brewster, Gordon & Company, and the county treasurer refused to cancel the sales of said farm.

That this application to the county treasurer was made under the provisions of § 23 of chapter 107 of the Laws of 1884. That the purchaser of the farm, Ernest Webster, refused to accept the deed or to

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take a conveyance of the farm or to pay any part of the purchase price therefor until the tax for the four years mentioned were paid or set aside, or in some manner discharged. That after the county treasurer refused to cancel the tax and the purchaser at the sale of the farm by your petitioner refused to take the farm unless protected from said tax for said years, your petitioner then paid said tax and took the county treasurer's receipts therefor. That said payment of taxes was not voluntarily made, but your petitioner was compelled to pay the same in order to dispose of said farm of Mrs. Wilcox under the power of sale contained in her will. The said will was admitted to probate by the surrogate of Monroe County and is recorded in Monroe County clerk's office. That in order to obtain a release from said taxes your petitioner in addition paid \$10.66 to the Monroe County treasurer for the preparation of deeds and such other additions as were made to the original taxes by the county treasurer, who refused to give receipts or to discharge the farm from said taxes until the full sum of \$287.07 was fully paid to him, and said sum was then fully paid to the Monroe County treasurer and he received the same upon said taxes upon said farm.

That after said taxes were paid and at the first session of the board of supervisors thereafter, and in the fall of 1896, a petition was presented to the board of supervisors of Monroe County stating all the facts and circumstances with reference to said assessment of said tax on said farm for the years above mentioned, which facts are herein stated and set forth, and by said petition the said board of supervisors was asked to refund to your petitioner the amount collected from him illegally and erroneously assessed or levied as provided by § 16 of chapter 686 of the Laws of 1892. That said petition to the board of supervisors was verified by your petitioner and stated all the facts with reference to said assessment, giving a copy of each assessment as above set forth, and calling the attention of the board of supervisors to the decisions of the courts holding that such assessment to the estate of a deceased person and the heirs of a deceased person were absolutely void, and no title could be conveyed to the purchaser at the sales for taxes upon said assessment. That the petition was received by the board of supervisors and referred to its committee duly appointed upon erroneous assessments, which committee made its report, as your petitioner is informed and believes, on December 22d, 1896, to the board of supervisors as follows :

"Petition denied, as your committee can find no authority for granting it. We believe the proper course in this case is to apply to the courts for relief."

That said report of said committee on erroneous assessments has been approved and adopted by the board of supervisors, and so the application to have the tax refunded was denied by the said board of supervisors of Monroe County.

That said assessments for said years are, as your petitioner is informed and believes, absolutely void, and not in compliance with the laws of the State, which require each assessment upon real property to be made to the owner or occupant thereof. That since the

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death of Mrs. Wilcox the farm has been occupied during the years when said assessments were made, by tenants who lived in the house on the farm, and occupied the premises and the house and buildings thereon during the years above mentioned. That said farm could readily have been assessed to the occupants thereof as the law requires. That before the tax was paid, and on February 15, 1896, at 10 A. M., the county treasurer, J. B. Hamilton, Esq., was requested by your petitioner to cancel said taxes and the sales of the farm therefor on the ground that the said assessments on said farm were absolutely void and that no title could be conveyed by him of the farm upon the tax sales thereof to Messrs. Brewster, Gordon & Company, and his attention was then called to § 23, chap. 107, of the Laws of 1884, an act for Monroe County only, and his attention was also called to the decisions of the Court of Appeals that such assessments were void, and that no title could be conveyed to the purchaser on such assessments, and upon said application a demand was made upon the county treasurer by your petitioner to cancel the sales of said farm.

That, as your petitioner is informed and believes, tax deeds were delivered upon said sales by the county treasurer, Mr. Hamilton, to Messrs. Brewster, Gordon & Co. That said deeds have never been recorded in Monroe County clerk's office, and that said deeds of said farm were delivered prior to the payment of said taxes by your petitioner. That said sum of \$287.07 is now in the hands of said county treasurer and was paid by your petitioner, and, as he is informed and believes, with interest thereon is the property of the estate of Mrs. Lydia M. Wilcox, deceased; and should be repaid and refunded to your petitioner as executor of her estate. That a demand was made to have said taxes refunded upon the board of supervisors, which demand was denied on or about December 24th, 1896, and prior to this application to the Monroe County court. That § 16 of chapter 686 of the Laws of 1892 provides that the board of supervisors "may correct any manifest clerical or other error in any assessment or assessments made by any one or more town officers of such board * * * and cause to be refunded to any person the amount collected by him of any tax illegally or improperly assessed or levied, and upon an order of the county court it shall refund such tax." That this application is made to the county court of Monroe County under the provisions of this section, after the tax has been fully paid and after a demand has been made upon the board of supervisors to refund the said tax, amounting to \$287.07, with interest thereon from the date of payment, and said application to the board of supervisors has been denied, all as above stated and set forth. That said sum paid as taxes has not been repaid to your petitioner, and is now in the hands of the county treasurer, and, as your petitioner is informed and believes, is legally the property of the estate of Mrs. Wilcox.

That your petitioner did not pay to the county treasurer until obliged to do so or lose the purchaser to whom he sold the farm under the power of sale in the will, and not until he demanded of the county treasurer, on notice to Messrs. Gordon, Brewster & Com-

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pany that said sales of the farm to them be cancelled as provided by § 23, chap. 107, of the Laws of 1884.

That it has been held "that only the purchaser, and not the owner of land sold for taxes, can apply to have the same cancelled," and it may be that this was the ground on which the county treasurer denied the application of your petitioner, although it was not so stated at the time of the application. That by the will of Mrs. Wilcox, duly admitted to probate and recorded as above stated, the farm was devised to certain of her children, but that only one of her children to whom the farm was devised lived in the town of Ogden during the years above mentioned when said illegal assessments were made, and that this one of her children at no time resided on the said farm, but on another farm in the town of Ogden, N. Y. That as petitioner verily believes, said assessments for said years are illegal and worthless on their face, and that said illegality can be determined from a mere inspection of the roll, and that therefore § 16 of chap. 686 of the Laws of 1892 clearly applies to this case as your petitioner believes, and that the board of supervisors had the power and authority under that section to cause to be refunded to petitioner said taxes illegally and improperly assessed or levied, and that upon an order of the county court it shall refund any such taxes. That the committee upon erroneous assessments, to whom the petition to refund was referred, denied the same on the ground that it had no authority to grant the petition, and that the proper course in this case was to apply to the courts for relief. The committee would seem to admit that the case was one for relief, and that the petition should be granted by the court having authority in the premises. That the farm was sold and conveyed by deed to Ernest Webster and another on April 1, 1896, free and clear of all claims for taxes during the years above mentioned. That your petitioner has computed the interest on said sum of \$287.07, paid by him to the Monroe County treasurer, from the time the sum was paid to January 1, 1897, and that the interest amounts to \$11.14, and that the whole amount due on that date is \$298.21, for which amount, with the costs of this application, an order refunding the same should be drawn, as your petitioner believes.

Your petitioner further states that the session of the board of supervisors which began in November, 1896, has not yet ended, and stands adjourned, as your petitioner is informed and believes, until January 9, 1897. That your petitioner is desirous of having the matter presented by this application disposed of at the earliest possible moment, and at the present term of the county court. That the next term of the county court begins January 24, 1897, and your petitioner is unable to state when the board of supervisors will adjourn without date, but it may be before the next term of the county court begins. That the next motion day of the county court on which this application may be made is January 4, 1897, and there is no time to give the usual eight days' notice of motion for that date, and your petitioner urges the facts herein stated as a special and sufficient reason for requiring a shorter notice. That it is provided by a rule of the county court that every Monday, except the first day of

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the term, with a jury, there shall be a county court only without a jury for the hearing of motions and *ex parte* applications, which rule is printed in the calendar, and dated January 18, 1895. That there is not sufficient time to give the usual eight days' notice of motion for January 4, 1897, the nearest Monday on which the application can be made, and so your petitioner asks for an order to show cause for all of the reasons above stated and set forth. Your petitioner further states that no other application has been made to any court or to any judge for an order to refund the tax above mentioned herein.

Wherefore, your petitioner asks an order of the county court of Monroe County directing that the board of supervisors of the county refund, or cause to be refunded, the sums of money paid by your petitioner on account of the said illegal assessments and taxes above named and set forth for the years above named on the farm of Mrs. Lydia M. Wilcox, situated in the town of Ogden, aforesaid, as provided by § 16 of chapter 686 of the Laws of 1892, and that an order directing that the said sum of money, amounting to the sum of \$298.21, be refunded to your petitioner, being the amount collected from him on account of said taxes illegally and erroneously assessed or levied on said farm, and upon this order of the county court the said board of supervisors shall refund said taxes to the petitioner with the costs of this application.

And your petitioner will ever pray as in duty bound, etc.
(*Add verification.*)

Order to Show Cause.

IN COUNTY COURT—MONROE COUNTY.

In the Matter of the Application of Delbert A.
Adams, etc.

154 N. Y. 619.

It having been made to appear by the verified petition of Delbert A. Adams that an application is to be made to the Monroe County court by the petitioner therein, for a rule or order of the court directing the board of supervisors of the county of Monroe to refund, or cause to be refunded, the sum of \$298.21, the amount of certain taxes with the interest thereon, and additions by the county treasurer thereto, as provided by § 16 of chap. 686 of the Laws of 1892, and that said amount, less the interest, has been paid to the county treasurer for taxes and assessments upon a farm of about 131 acres of land in the town of Ogden, N. Y., owned by Mrs. Lydia M. Wilcox at the time of her death, during the years 1891, 1892, 1894, and 1895, three of which assessments were made in substance to the estate of Mrs. Wilcox and the other one to the heirs of Mrs. Wilcox, all of which assessments are set forth in the petition, and therein claimed to be worthless and absolutely void, and it appearing that the amount of said taxes has been received by the county treasurer of the county of Monroe, and receipts therefor given to the petitioner and now in his possession, that said taxes have been paid, and thereafter an appli-

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cation has been made to the board of supervisors of the county of Monroe by the petitioner to have said taxes refunded and repaid to said petitioner by his petition, duly verified by him, which petition was received by the board of supervisors at its annual session in November, 1896, and by the board referred to its committee on erroneous assessments, which reported on December 22, 1896, as follows: "Petition denied, as your committee can find no authority for granting it. We believe the proper course is to apply to the courts for relief," and that such report has been approved and adopted by the board of supervisors, and that the application to have such tax refunded has been denied by the board, and that said taxes have not been repaid to the petitioner, and are now in the hands of the Monroe County treasurer, and claimed by the petitioner to be the property of the estate of Mrs. Wilcox, and that an order should be drawn by the board of supervisors on the county treasurer in favor of the petitioner, the executor of her estate, for the amount thereof, and it appearing that it is advisable to have the application presented to the present board of supervisors, now in session and adjourned to January 9th, 1897, and disposed of at the earliest possible moment, and that there are not eight days in which to give the usual notice of motion before the next motion day of the court, which is urged as a special and sufficient reason for requiring shorter notice, within rule 37 of the General Rules of Practice.

Now, therefore, on motion of Delbert A. Adams, petitioner and attorney in person, it is

Ordered, that the application of the petitioner presented by the annexed petition be heard at the regular term of the Monroe County court, appointed to be held at the court-house, in the city of Rochester, N. Y., on Monday, January 4th, 1897, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard. And it is further

Ordered, that the board of supervisors of the county of Monroe, at that time and place, show cause before the court why a rule or order should not be granted, directing the board of supervisors of the county of Monroe to refund and repay said taxes and interest and additions by the county treasurer, amounting to the sum of \$298.21, to the petitioner, with the costs of this application, and also show cause why the relief demanded by the petition should not be granted, together with such other relief as the court will grant. And it is further

Ordered, that copies of all the papers and of this order be served upon the board of supervisors of the county of Monroe, by delivering a copy of this petition and of this order to James H. Redman, Esq., the chairman of said board of supervisors, on or before Wednesday, December 30, 1896, and in this order it is directed that service thereof less than eight days before it is returnable, as aforesaid, be sufficient within the provisions of § 780 of the Code of Civil Procedure.

Dated December 28th, 1896.

GEORGE R. CARNAHAN,
Special County Judge, Monroe County.

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Order.

At the term of the Monroe County court, held at the court-house in the city of Rochester, on the 21st day of January, 1897 :

Present :—Hon. George A. Carnahan, *Special County Judge, presiding.*

In the Matter of the Application

of

Delbert A. Adams, etc.

} 154 N. Y. 619.

On reading and filing the petition of the above-named petitioner, Delbert A. Adams, and the will of Lydia M. Wilcox, late of the town of Ogden, Monroe County, N. Y., deceased, and now on file in the surrogate's office of Monroe County, and also recorded in the Monroe County clerk's office in Liber 486 of Deeds at page 73, by which it appears, among other things, that the petitioner herein is not the sole executor of Lydia M. Wilcox, and it also appearing by the admission in open court of the petitioner herein that he had no power to pay the taxes mentioned in the said petition under said will, and also by the will, and upon an order to show cause heretofore granted in these proceedings, namely, on the 28th day of December, 1896, and upon all the papers and proceedings herein, the counsel for the board of supervisors of Monroe County made the following preliminary objections, namely, that the papers on their face do not entitle the petitioner for the relief prayed for, and that he was not the sole executor under the will of Lydia M. Wilcox, and that the sums of money alleged to have been paid out by the petitioner were paid voluntarily by him.

Now, after hearing Delbert A. Adams, the petitioner, in person for said motion, and John Desmond, attorney for the board of supervisors of Monroe County, in opposition thereto,

Ordered, that said petition be and the same is hereby denied (or allowed) with \$10 costs.

GEORGE A. CARNAHAN,

Special County Judge, Monroe County.

ARTICLE III.

REVIEW BY CERTIORARI OF DETERMINATION OF COMPTROLLER ON REVISION OF CORPORATION TAX. Tax Law, §§ 195-196.

§ 195. Revision and readjustment of accounts by comptroller.

The comptroller may, at any time within one year from the time any such account shall have been audited and stated, and notice thereof sent to the person, partnership, company, association, or corporation, against whom it is stated, revise and readjust such account upon application therefor by the party against whom the account is stated, or by the attorney-general, and if it shall be made to appear upon any such application by evidence submitted to him or otherwise, that any such account included taxes or other charges which could not have been lawfully demanded, or that pay-

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ment has been legally made or exacted of any such account, he shall resettle the same according to law and the facts, and charge, or credit, as the case may require, the difference, if any, resulting from such revision or resettlement upon the accounts or taxes of or against any such person, partnership, company, association, or corporation. The comptroller shall forthwith send written notice of its determination upon such application to the applicant, which notice may be sent by mail to his postoffice address.

§ 196. Review of determination of comptroller by certiorari.

The determination of the comptroller upon any application made to him by any person, partnership, company, association, or corporation, for a revision and resettlement of any account, as prescribed in this article, may be reviewed both upon the law and the facts, upon *certiorari* by the Supreme Court at the instance of any person, partnership, company, association, or corporation, affected thereby, and in the name and on behalf of the people of the State. For the purpose of such review the comptroller shall return, on such *certiorari*, the accounts and all the evidence before him on such application, and all the papers and proofs upon the original statement of such account, and all proceedings thereon. If the original or resettled accounts shall be found erroneous or illegal, either in point of law or fact, by the Supreme Court, upon any such review, the accounts reviewed shall then be corrected and restated, and from any determination of the Supreme Court upon any such review, and appeals to the Court of Appeals may be taken by either party.

No attempt will be made in treating of this subject to give the substantive law with reference to the taxation of corporations under the provisions of the Tax Law relative thereto. The authorities will be confined to such matters as appertain to the regulation of the writ of *certiorari* on review of the determination of the comptroller with reference to corporation taxation. The practice upon such review will be given, with forms for the petitioner, writ, and other proceedings therein. That is to say, procedure only will be considered as being within the scope of this work. Where the assessment complained of was, as far as it was in the power of the comptroller to do so, settled July 3, 1889, and immediate notice of the assessment given to the collector, and after the expiration of 30 days no proceeding was taken to review the same, and the comptroller has issued his warrant for the collection of the same; *held*, that the relator did not by delay lose its right to review by *certiorari*. *People ex rel. Brush E. I. Co. v. Wemple*, 42 St. Rep. 273.

The time within which *certiorari* to review a decision of the comptroller upon an application to revise and readjust taxes may be granted cannot be extended by a second application to him or one to set aside his former decision. After the comptroller has rendered his decision the power conferred upon him is spent

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and the decision should have the force of a judgment. But if he have power to open the case and judge it on the merits anew, he is not bound to do so, and *certiorari* will not lie to review his decision in that regard. *People ex rel. American Surety Co. v. Campbell*, 46 St. Rep. 228. It was held, in *Harlan & Hollingsworth Co. v. Campbell*, 54 St. Rep. 451, 139 N. Y. 68, where an appeal from proceedings which was taken within 30 days after service upon the relator of a notice of settlement was not objected to on the hearing before the General Term, that it is too late to take it by objection; it should have been taken by motion to quash the writ. The determination of a public officer charged with the duty of deciding whether property in his jurisdiction is taxable, will not be set aside unless it conclusively appears that the valuation was erroneous. The comptroller or public officer representing the people cannot, by making a return to the writ of *certiorari*, waive any failures or omissions on the part of the person or corporation taking the proceeding to comply with the practice prescribed by law in such cases. *People v. Wemple*, 60 Hun, 225, 129 N. Y. 544.

Where the relator did not produce its witnesses for examination before the comptroller, but furnished affidavits which were received without objection on the part of the comptroller, and were considered by him as evidence, it was held that objection could not be raised upon appeal that such evidence was not competent within the provisions of the statute; that while the comptroller could have required the witnesses to be examined orally before him, it was for him to determine how the evidence should be produced, and he could receive and treat the affidavits as competent evidence. *Harlan & Hollingsworth Co. v. Campbell*, 54 St. Rep. 451, 139 N. Y. 68. On *certiorari* to review action of comptroller in imposing taxes upon a corporation, the burden rests upon the relator to show error or mistake. *People ex rel. Brooklyn El. R. R. Co. v. Roberts*, 90 Hun, 537, 36 Supp. 34, 71 St. Rep. 41; *People v. Campbell*, 80 Hun, 466, 62 St. Rep. 304, 30 Supp. 472.

The party who seeks a readjustment of taxes settled by the comptroller must produce evidence to show error of such settlement. *People v. Campbell*, 70 Hun, 507, 53 St. Rep. 590, 24 Supp. 208. The determination of the comptroller upon the question of valuation is conclusive unless clearly shown to be erroneous.

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People ex rel. Edison El. Co. v. Campbell, 88 Hun, 530, 34 Supp. 713, 68 St. Rep. 747. To the same effect: *People ex rel. Stokes v. Roberts*, 90 Hun 533, 36 Supp. 73, 71 St. Rep. 409; *People ex rel. W. E. Co. v. Campbell*, 145 N. Y. 587, 65 St. Rep. 526, affirming 80 Hun, 466, 62 St. Rep. 304, 30 Supp. 472; *People ex rel. v. Roberts*, 82 Hun, 313, 63 St. Rep. 574, 31 Supp. 245; *People ex rel. v. Roberts*, 82 Hun, 352, 63 St. Rep. 573, 31 Supp. 243.

This rule was reiterated in *People ex rel. Edison El. L. Co. v. Campbell*, 148 N. Y. 759, reversing 88 Hun, 530, 34 Supp. 713, 68 St. Rep. 747, on another point. Where the tax has been revised and readjusted and the comptroller has rendered his decision, the power conferred by statute is spent. *People ex rel. American Surety Co. v. Campbell*, 64 Hun, 417, 46 St. Rep. 228, 19 Supp. 652. It has been held further upon this point that the determination of the comptroller should be allowed to stand. *People ex rel. A. C. & D. Co. v. Wemple*, 129 N. Y. 558, 42 St. Rep. 406, affirming 60 Hun, 225, 38 St. Rep. 17, 14 Supp. 859.

Certiorari cannot be sustained to review the determination of the comptroller under chap. 361 of the Laws of 1881, where the relator did not first ask for a rehearing by the comptroller. *People ex rel. Edison Il. Co. v. Wemple*, 33 St. Rep. 29, 11 Supp. 246. In making a revision of a corporation tax the comptroller acts as an assessor, and it is competent for him to rely upon the books and records of the company showing the amount of its property employed outside of the State. *People v. Campbell*, 88 Hun, 544, 34 Supp. 801, 68 St. Rep. 811.

Affidavits of verification of a petitioner for revision of an assessment on a corporation need not be signed by the person making it where he has signed the petition and his name in the affidavit, nor is the effect of such affidavit impaired by the use of the words "to the best of his knowledge and belief" at the end thereof. *People v. Campbell*, 88 Hun, 544, 34 Supp. 801, 68 St. Rep. 811. The return of the comptroller to a writ of *certiorari* should state the facts upon which he bases his determination. *People ex rel. Staten Island Rapid Transit Co. v. Roberts*, 4 App. Div. 334, 38 Supp. 724, 74 St. Rep. 107.

The provisions of chapter 361 of the Laws of 1881, for an appeal by a corporation from the determination of the comptroller relative to taxation to a board of State officers therein prescribed, do not apply to a case where the corporation claims that it is not

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subject to any taxation whatever. *People v. Wemple*, 129 N. Y. 543, 42 St. Rep. 272, reversing 39 St. Rep. 614, 15 Supp. 718.

Relief may be given to a corporation exempt from taxation, which has paid the tax imposed upon it, although such payment was not made under coercion. *People ex rel. Ed. Il. Co. v. Wemple*, 141 N. Y. 471, 57 St. Rep. 609; see *People ex rel. Edison El. Co. v. Wemple*, 69 Hun, 367, 52 St. Rep. 786, 23 Supp. 661.

In determining the value of the capital employed by a corporation in State of New York, the comptroller is not bound by the appraisal of the stock of the corporation made by its officers. *People ex rel. Schwarzschild v. Roberts*, 11 App. Div. 449, 42 Supp. 317.

Where the return of the comptroller on *certiorari* shows all the proceedings before him, including his decision, he cannot be required to add items or particulars to it and then return it. *People ex rel. Wiebusch v. Roberts*, 18 Misc. 530, 42 Supp. 1089.

Notice of Application for Writ.

SUPREME COURT—CITY AND COUNTY OF NEW YORK.

In the Matter of the Application of The New York Central & Hudson River Railroad Company for a writ of *certiorari* to be directed to James A. Roberts, as Comptroller of the State of New York.

Please take notice that on the petition of The New York Central & Hudson River Railroad Company, verified December 6, 1897, and on the undertaking for costs herein, filed with the comptroller of the State of New York, copies of which are hereto annexed, we shall move this court at a Special Term, Part I., to be held in the county court-house, in the city of New York, on the 17th day of December, 1897, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order for a writ of *certiorari* and also for a writ of *certiorari* to be directed to you as prayed for in said petition, and to be returnable according to law, and for such other and further relief as may be just.

Dated New York, December 7, 1897.

Yours, etc.,

BROWN & WELLS,

Attorneys for Petitioner,

To Hon. JAMES A. ROBERTS,
Comptroller of the State of New York,
Albany, New York.

36 Wall Street, New York.

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Petition.

To the Supreme Court of the State of New York :

The petition of the New York Central & Hudson River Railroad Company respectfully shows :

First. That it is a railroad corporation duly organized and existing under the laws of the State of New York, and engaged as a common carrier of freight and passengers for hire through the State of New York and other States of the United States, and that it was so engaged in business at the times hereinafter mentioned.

Second. That during the year ending June 30, 1896, your petitioner was in receipt of tolls from its transportation business originating and terminating within the State of New York ; that it was also in receipt of tolls from its transportation business of an interstate character, and that during said year your petitioner was also in receipt of income from various sources other than its transportation business and not arising from the exercise of its corporate franchise.

Third. That heretofore and on the 16th day of August, 1896, and on the 1st day of March, 1897, your petitioner, as required by law, made written reports to the comptroller of the State of New York of its condition at the close of business on June 30, 1896, stating the amount of its gross earnings from all sources, and the amount of its gross earnings from its transportation business originating and terminating within this State ; that upon said report of August 18, 1896, said comptroller settled an account against your petitioner for \$98,312.76 for taxes on gross earnings under the provisions of § 184 of chapter 908 of the Laws of 1896, which said account included taxes on the gross earnings of your petitioner from its transportation business originating and terminating within the State of New York, and in addition thereto, taxes on gross earnings from business of an interstate character, as well as taxes on income derived from various other sources.

Fourth. That your petitioner, feeling aggrieved at said determination of said comptroller, made application for a revision and readjustment of said account for taxes, and on the 18th day of March, 1897, said comptroller, having heard the proofs and examined the supplemental report of your petitioner of March 1, 1897, readjusted and resettled said accounts for taxes by excluding therefrom the taxes based upon the gross earnings of your petitioner from transportation business of an interstate character, and reduced the assessment against your petitioner from said sum of \$98,312.76 to the sum of \$91,563.60.

Fifth. That your petitioner, feeling dissatisfied and aggrieved with said account for taxes and the readjustment and resettlement thereof by said comptroller, applied, on or about the 17th day of March, 1897, for a rehearing of said application, and said comptroller, on the 9th day of November, 1897, having heard the proofs offered on behalf of your petitioner in support of said application, determined that said account did not include taxes which could not have been lawfully demanded, and declined to make any revision or readjustment of the same.

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Sixth. That heretofore and on or about the 15th day of April, 1897, your petitioner deposited with the State treasurer the full amount of the taxes, percentage, interest, and other charges audited and stated in such account of the State comptroller.

Seventh. That your petitioner, The New York Central & Hudson River Railroad Company, is aggrieved by the settlement of said account for taxes, and alleges that the determination of said comptroller upon the application of your petitioner for a revision and readjustment of the same is erroneous and illegal for the following reasons :

1. That said account includes taxes which could not lawfully be demanded.

(a) It includes taxes on the earnings of the Western Union Telegraph Company upon which that company was taxed under the provisions of said § 184 of chapter 908 of the Laws of 1896.

(b) It includes taxes on the earnings of the American Express Company and the National Express Company upon which these companies were taxed under the provisions of said § 184 of chapter 908 of the Laws of 1896.

(c) It includes taxes on income received by the New York Central & Hudson River Railroad Company from other railroad companies for the use of its tracks and other property, paid to it out of the earnings of those companies from their transportation business within the State of New York, upon which said earnings said companies were taxed under the provisions of said § 184 of chapter 908 of the Laws of 1896.

(d) It includes taxes on income derived from the New York Central & Hudson River Railroad Company from investments of its capital stock in the bonds and stocks of other corporations, from investments of its capital stock in real estate, and taxes on income from miscellaneous sources, all of which said income was derived from sources other than its transportation business originating and terminating in the State of New York, and which said income is not subject to taxation under the provisions of § 184 of chapter 908 of the Laws of 1896.

2. That § 184 of chapter 908 of the Laws of 1896, imposing the tax in question, does not include, and it was not the intention thereof to include, the gross earnings or the income derived from any other source than the transportation business originating and terminating within this State.

3. That the determination of said comptroller in the settlement of said account for taxes against your petitioner results in the double taxation of the same fund, or a part thereof, under the same statute for the same purpose.

4. That said account includes taxes on receipts or income not derived from the exercise of the corporate franchises of your petitioner, which said income is not subject to taxation under the provisions of § 184 of chapter 908 of the Laws of 1896.

Eighth. That no previous application for a writ of *certiorari* has been made in this matter by your petitioner.

Wherefore, your petitioner prays that a writ of *certiorari* may be issued from this court directed to James A. Roberts, as comptroller

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of the State of New York, commanding him to certify and return, all and singular his proceedings and decisions relative to the settlement, revisions, and readjustment of the account for taxes of the New York Central & Hudson River Railroad Company for the year ending June 30, 1896, with all the evidence, documents, reports, records, and papers relating thereto, or duly certified or sworn copies thereof, in his possession, or under his control, submitted to, or considered by him concerning the said account, and the grounds for his refusal to further revise and readjust the same, to the end that his said determination may be reviewed and corrected by this court both upon the law and the facts, and that your petitioner may have such other and further relief as may be just.

THE NEW YORK CENTRAL & HUDSON
BROWN & WELLS, RIVER R. R. CO.,
Attorneys. By CHAUNCEY M. DEPEW,
President.

STATE OF NEW YORK,)
CITY AND COUNTY OF NEW YORK, } ss.:

Chauncey M. Depew, being duly sworn, says: That he is president of the New York Central & Hudson River Railroad Company, the petitioner named in the above entitled proceedings; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Deponent further says, that the reason this verification is not made by the petitioner is that the petitioner is a corporation and deponent an officer thereof, to wit, president. CHAUNCEY M. DEPEW.

Sworn to before me this 6th)
day of December, 1897.)

H. C. DUVAL,
Notary Public, Kings Co.

Undertaking.

(Title.)

WHEREAS, On the 12th day of March, 1897, the comptroller of the State of New York did revise and readjust the account of the New York Central & Hudson River Railroad Company, for taxes assessed and determined against it for the year ending June 30, 1896, under the provisions of § 184 of chapter 908 of the Laws of 1896, and pursuant to the authority vested in him, did reduce the amount of said assessment against said company from the sum of \$98,312.76 to the sum of \$91,563.60, which said sum of \$91,563.60 was determined by said comptroller to be the amount which said company was liable to pay as taxes upon its gross earnings within the State of New York for the year ending June 30, 1896; and,

WHEREAS, A rehearing of said application for a revision and readjustment of said account for taxes was granted, and said comptroller, having heard the proofs offered on behalf of said applicant, did determine that said assessment of \$91,563.60 did not include taxes which could not have been lawfully demanded, and, on the 9th day

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of November, 1897, did decline to make any revision or readjustment of the same ; and,

WHEREAS, The said The New York Central & Hudson River Railroad Company is dissatisfied and aggrieved with said account for taxes, and with the revision and readjustment thereof, and proposes to review the same by writ of *certiorari*.

Now, therefore, the Fidelity & Deposit Company of Maryland, a corporation duly authorized by the laws of the State of New York to execute surety bonds, having an office and principal place of business for said State at No. 35 Wall Street, in the city of New York, does hereby undertake that if the said writ of *certiorari*, which may be granted upon the application of the New York Central & Hudson River Railroad Company, to review the resettlement and readjustment by the comptroller of the State of New York, of said account against the New York Central & Hudson River Railroad Company, for taxes on gross earnings for the year ending June 30, 1896, be vacated and said revision and readjustment be sustained, the said The New York Central & Hudson River Railroad Company, the applicant for said writ of *certiorari*, will pay all costs and charges which may accrue against said company in the prosecution of said writ, including costs on all appeals to any and all courts, not exceeding the sum of five hundred dollars.

Dated New York, December 4th, 1897.

FIDELITY & DEPOSIT COMPANY
OF MARYLAND,
HENRY B. PLATT,

(Add acknowledgment and justification.) Vice-President.

Indorsed :—"I approve the within bond and the sufficiency of the surety therein."

Dated December 4th, 1897.

F. SMYTH,
J. S. C.

Petition.

To the Supreme Court of the State of New York:

Your petitioner, the Niagara River Hydraulic Company, respectfully shows to the court as follows, to wit :

1. That your petitioner is a corporation duly organized and existing under the laws of the State of New York, having been incorporated by an act of the legislature of the State of New York, passed April 11, 1832, and known as chapter 116 of the Laws of 1832, and entitled "An Act to Incorporate the Niagara River Hydraulic Company."

That it is provided in and by the said act of incorporation that your said petitioner is incorporated for "hydraulic and manufacturing purposes," as by the said act of incorporation, to which reference is hereby made, will more fully appear.

That the capital stock of your said petitioner consists of fifteen hundred shares of the par value of one hundred dollars each, upon eight hundred shares of which stock a payment of thirty dollars per share and no more has been made, and upon the remainder of which, to wit, seven hundred shares, a payment of twenty dollars per share

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and no more has been made; and that the said stock, as your petitioner is informed and believes, was issued at or about the time of the incorporation of your said petitioner, in payment of the purchase price of certain real estate, to wit, an island known as "Squaw Island," and situate in the Niagara River, in the city of Buffalo, in the State of New York, which has ever since remained the property of your petitioner, and which is the only property now owned by your petitioner, or which it has owned since long prior to the year 1880.

2. That for several years prior to the year 1880, your petitioner had not, nor has it at any time since employed any of its capital stock in business within the State of New York or elsewhere in any way, nor exercised the rights granted to it by its charter, nor had any regular office for the transaction of business, nor done any acts as a corporation except from time to time to elect officers as provided by its act of incorporation; nor paid any dividends upon its capital stock, nor made any sales or other disposition of any of its property as aforesaid.

3. That the capital stock of your said petitioner has not at any of the times hereinbefore mentioned, nor has any part thereof, been sold, and, as your petitioner is informed and believes, the said capital stock has no market value.

4. That the real estate owned by your said petitioner as aforesaid has been annually assessed for taxation in the city of Buffalo, and the taxes so imposed upon it have been paid, not by your petitioner, which has not at any of the times hereinbefore mentioned had any moneys or assets whatsoever, except the said real estate, but by the individual stockholders of your petitioner, who have also provided the moneys necessary for your petitioner to enable it to institute these proceedings and to make the deposit required by law.

5. That heretofore and in the years 1895 and 1896, James A. Roberts, the comptroller of the State of New York, purporting to act under the authority of law known as chapter 542 of the Laws of 1880 and the laws amendatory thereof and supplementary thereto, required your petitioner to make certain reports to him in regard to its condition, and examined certain officers of your petitioner in regard thereto, and thereafter and on or about the 30th day of April, 1896, sent a notice in writing to your petitioner, wherein he stated that pursuant to the laws aforesaid he had assessed against your petitioner a tax amounting to \$3,600 for the sixteen years ending November, 1st 1895, and that an account for \$3,960 had been settled by him against your petitioner, being the amount of the tax so assessed with the penalty due thereon.

6. That thereafter and within one year from the time when such account was so audited and stated and notice thereof was sent to your petitioner, the said comptroller revised and readjusted such account upon application therefor by your petitioner, and upon such application further evidence, oral and documentary, was submitted to the said comptroller by your petitioner, from which evidence the facts stated in paragraphs 1, 2, 3, and 4 hereof appear; and particularly it appeared that your petitioner was a manufacturing corporation; that it had never been engaged in any business other than

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manufacturing, and that during the period covered by the said tax it had not been engaged in any business, nor had any office for the transaction of business, nor in any way actively exercised the rights granted to it by the said charter ; and it further appeared from such evidence that the real estate aforesaid was not salable or of any considerable value ; all of which facts will more fully appear from the statements, report, and evidence aforesaid, to which reference is hereby made.

7. That thereafter and on the 20th day of April, 1897, the said comptroller sent a written notice to your petitioner of his determination upon such application, which notice was to the effect that the said comptroller, having heard the proofs offered on behalf of your petitioner, did determine that the assessment theretofore made against your petitioner should be reduced to the sum of \$3,300, which said sum of \$3,300 was thereby determined as the amount which the said Niagara River Hydraulic Company was liable to pay under the provisions of chapter 542 of the Laws of 1880, and the acts amendatory thereof, for the sixteen years ending November 1, 1895, and to which notice was annexed a statement of account between your petitioner and the State of New York, showing the amount due by your petitioner to be a tax of one and a half mills on an appraised value of capital stock of \$125,000 for sixteen years, amounting to \$3,000, and a penalty of 10 per cent., amounting to \$300, making a total of \$3,300, as aforesaid.

8. That thereafter, and on or about the 13th day of May, 1897, your petitioner deposited with the State treasurer of the State of New York the full amount of the taxes, percentage, interest, and other charges audited and stated in such account, and did also, on or about the 17th day of May, 1897, file an undertaking with the comptroller of the State of New York, in the sum of \$250 with the American Surety Company as surety, duly approved by the Hon. Frederick Smyth, a justice of the Supreme Court, to the effect that if the writ of *certiorari* for which your petitioner was about to apply for the purpose of reviewing the said determinations of the said comptroller should be dismissed, or the determinations of the comptroller affirmed, the applicant for the writ would pay all costs and charges which might accrue against it in the prosecution of the writ, including costs of all appeals.

9. That as your petitioner is advised and verily believes, the determination of the said comptroller may be reviewed by this court by a writ of *certiorari* and relief granted to your petitioner as provided by law.

Wherefore, your petitioner prays that a writ of *certiorari* may be allowed by and issued out of this honorable court directed to the said James A. Roberts, comptroller of the State of New York, commanding him to certify and return to this court all and singular his proceedings, decisions, determinations, and actions, as such comptroller had and made in the premises, or duly certified or sworn copies thereof, together with the record of the proceedings before him in the matter of the original assessment and settlement of the said account for the said taxes, including the evidence taken by him

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therein, and the correspondence of your petitioner with the said comptroller in the premises, and also the said application of your petitioner for a resettlement and readjustment of the said account thereafter settled by the said comptroller, including the evidence or proof, oral and documentary, upon such application. To the end that the said proceedings, decisions, determinations, and actions had by the said comptroller upon the original assessment and settlement of account against your petitioner and upon the said application of your petitioner for a revision and resettlement of the said account may be reviewed by this court, both upon the law and the facts, and that if such original or resettled account shall be found erroneous or illegal either in point of law or fact, the said assessment shall be vacated or corrected, and the said account shall be set aside or corrected, and restated by this court, and that your petitioner may have such other and further relief in the premises as to the court may seem just.

And your petitioner will ever pray, etc.

THE NIAGARA RIVER HYDRAULIC
COMPANY,
(*Verification.*) By JAS. A. REILLY,
Secretary.

Petition.

To the Honorable the Supreme Court of the State of New York :

The petition of the Eastman's Company of New York, by Thomas F. Devoe, its secretary, respectfully shows :

1. That your petitioner is a corporation organized under the laws of the State of New York, and, during the years ending November 1st, 1890, 1891, 1892, 1893, and 1895, was engaged in business in said State.

2. That the authorized capital of your petitioner was the sum of seven hundred and fifty thousand dollars (\$750,000), divided into 7,500 shares of the par value of one hundred dollars (\$100) each, all of which had on the first day of November, 1893, been issued for good-will, money, and property. That on the 1st day of November, 1895, the authorized capital of your petitioner was the sum of one million dollars (\$1,000,000), divided into 10,000 shares of the par value of \$100 each, all of which had, on the said 1st day of November, 1895, been issued for good-will, money, and property.

3. That on or about the 10th day of November, in each of the years 1890, 1891, 1892, 1893, and 1895, at the request of the State comptroller, your petitioner made, for the then current year ending November 1st of such respective years, a report under chapter 542, Laws of 1880, and the acts amending the same, and delivered the same to the comptroller of the State of New York, copies of which reports are hereto annexed, marked, respectively, "A 1," "A 2," "A 3," "A 4," "A 5."

4. That after the several deliveries of the said report as aforesaid, and severally, on or about the 20th day of December, 1890, 1891, 1892, 1893, and the 20th day of March, 1896, there was ascertained,

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determined, and fixed under said chapter 542, Laws of 1880, as amended, by the State comptroller, the amount of capital stock employed by your petitioner in the State of New York, severally for each of said years as follows :

For the year ending November 1st, 1890.....	\$750,000 00
For the year ending November 1st, 1891.....	\$750,000 00
For the year ending November 1st, 1892....	\$750,000 00
For the year ending November 1st, 1893.....	\$750,000 00
For the year ending November 1st, 1895..	\$500,000 00

5. That thereafter, and on or about the 20th day of December, 1890, 1891, 1892, 1893, and on or about the 20th day of March, 1896, the State comptroller, under said chapter 542, Laws of 1880, as amended, severally fixed and determined the tax to be paid by your petitioner for the said years severally ending November 1, 1890, 1891, 1892, 1893, 1895, and there was made and settled by the said comptroller an account or accounts against your petitioner for taxes arising under said act of 1880 as amended for the said years ending November 1, 1890, 1891, 1892, 1893, 1895, as follows :

For the year ending November 1st, 1890.....	\$1,125 00
For the year ending November 1st, 1891.....	\$1,125 00
For the year ending November 1st, 1892.....	\$1,125 00
For the year ending November 1st, 1893.....	\$3,093 75
For the year ending November 1st, 1895.....	\$ 750 00

6. That thereafter, and severally, on or about the 15th day of January, 1890, 1891, 1892, 1893, your petitioner severally paid to the treasurer of the State of New York, for and on account of such taxation, the said taxes so made and settled, as follows :

January 15th, 1890, for the said taxation 1890.....	\$1,125 00
January 15th, 1891, for the said taxation 1891.....	\$1,125 00
January 15th, 1891, for the said taxation 1892.....	\$1,125 00
January 15th, 1891, for the said taxation 1893.....	\$3,093 00
July 13th, 1896, in full for the said taxation and penalty 1895	\$ 825 00

the receipt for which tax and penalties for the year ending November 1, 1895, is hereto annexed marked "B."

7. That thereafter, and on or about April 9th, 1896, your petitioner, claiming the benefit of the right given by chapter 463 of the Laws of 1889, to have the decisions and determinations aforesaid of the comptroller revised and readjusted, filed with the said comptroller an application in writing in the form of a verified petition for a revision and readjustment of the taxes previously settled and determined as aforesaid, against your petitioner for the years 1890, 1891, 1892, 1893, 1895, a copy of which petition is hereto annexed marked "C."

8. That the comptroller granted such a rehearing for the purpose of such revision and readjustment of said taxation, and that thereafter, and on the 5th day of May, 1896, a rehearing was had before the said comptroller and evidence taken therein by and before said comptroller, a copy of which evidence and affidavit

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supplementary thereto, requested and received by said comptroller, is hereto annexed marked "D."

9. That thereafter, and on the 30th day of June, 1896, said comptroller refused to revise and readjust said account theretofore settled against your petitioner and rendered his decision, a copy of which decision is hereto annexed marked "E," and your petitioner further shows that thereafter, and on or about July 1st, 1896, notice was given by mail to your petitioner by the said comptroller of said refusal to revise and readjust said taxes so as aforesaid first assessed and determined against your petitioner.

10. And your petitioner further shows that the said determination of said comptroller of June 30, 1896, is final in this matter, and can only be reviewed by this court on *certiorari*.

11. Your petitioner further shows that the appraisal of the value of capital stock employed in business in this State by your petitioner during said years 1890, 1891, 1892, 1893, and 1895 is erroneous, by reason of over-valuation.

12. That your petitioner has filed with the said comptroller an undertaking in the sum of five hundred dollars (\$500), with sufficient sureties, duly approved by a justice of the Supreme Court of this State, a copy of which undertaking and approval thereof is hereto annexed marked "F."

Wherefore, your petitioner, desiring to review the action of the comptroller upon such application made to him by your petitioner for a revision and resettlement of accounts hereinbefore set forth, prays that a writ of *certiorari* may be issued out of this court, directed to the comptroller, State of New York, commanding the said comptroller to certify and return to the office of the clerk of Albany County all and singular his proceedings had in this matter and his decisions, setting forth particularly the items of capital stock employed by the petitioner within this State, which items in their aggregate valuation, as appraised by said comptroller, are to be set forth as itemized and valued by the comptroller in estimating the capital stock of your petitioner employed in the State of New York during the year ending November 1, 1895, as well all his actions in the premises with the dates thereof, and all and singular the accounts, affidavits, reports, and all the evidence submitted to him, said comptroller, or upon which is based in whole or in part his decision upon said resettlement, rehearing, and readjustment of the aforesaid account, to the end that if said decision and account, original or resettled, shall be found erroneous or illegal by the said Supreme Court, they may be revised, corrected, or restated by said Supreme Court, and for such other and further relief as may be just.

Dated New York, July 14, 1896.

EASTMAN'S CO. OF NEW YORK,

EDMUND L. COLE,

By THOS. F. DE VOE,

*Attorney for Eastman's Company
of New York, Office and Post-
office address, 256-257 Broad-
way, New York, N. Y.*

Secretary.

(Verification)

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Order for Writ of Certiorari.

At the Special Term, Part I., of the Supreme Court, held in and for the First Judicial District, at the county court-house, in the city of New York, on the 17th day of December, 1897 :

Present :—Hon. Charles H. Truax, *Justice*.

The People of the State of New York on the
Relation of The New York Central & Hudson
River Railroad Company,

agst.

James A. Roberts, as Comptroller of the State of
New York.

Upon reading and filing the petition of The New York Central & Hudson River Railroad Company, verified December 6, 1897, together with a notice of motion or a writ of *certiorari*, with proof of due service thereof on James A. Roberts, comptroller of the State of New York ; Now, after hearing David Willcox, of counsel for the relator, in favor of the motion, no one appearing in opposition thereto, on motion of Brown & Wells, attorneys for said relator,

It is ordered, that a writ of *certiorari* as prayed for in said petition be issued, directed to James A. Roberts, as comptroller of the State of New York ; that said writ be returnable within twenty days after the service thereof, at the office of the clerk of the county of Albany, and that said writ be allowed and signed and sealed by the clerk of this court.

C. H. T.,

Enter.

Justice Supreme Court.

Writ of Certiorari.

The People of the State of New York, on the
Relation of the New York Central & Hudson
River Railroad Company, to James A.
Roberts, as Comptroller of the State of New
York.

WHEREAS, We have been informed by the petition of the New York Central & Hudson River Railroad Company, verified December 6, 1897, that James A. Roberts, as comptroller of the State of New York, did, on the 12th day of March, 1897, grant in part a certain application made by said The New York Central & Hudson River Railroad Company, a railroad corporation duly organized and existing under the laws of the State of New York, to the said comptroller, to revise and readjust its account for taxes assessed against it under the provisions of chapter 908 of the Laws of 1896, on gross earnings for the year ending June 30, 1896, and did on the 9th day of November, 1897, upon a rehearing of said application, decline to make a further revision and readjustment of said account ;

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That the full amount of the taxes, percentage, interest, and other charges audited and stated in said account have been deposited with the State treasurer, and that an undertaking for costs has been filed by said company with the State comptroller in accordance with the statutes in such cases made and provided ;

That said account as settled by said comptroller includes taxes which could not lawfully be demanded, and that James A. Roberts, as comptroller of the State of New York, has in his custody and under his control, the said application, and the reports, evidence, documents, decisions, and other records and papers upon which said decisions were made, and which are required to be certified ; and

WHEREAS, A notice of motion for a writ of *certiorari*, together with a copy of the petition and the undertaking for costs in this proceeding, was duly served upon the comptroller of the State of New York, on the 7th day of December, 1897, and said motion was duly granted and an order therefor made, and we being willing to be certified of the said proceedings, and of all things and documents appertaining to the same,

Do command you, James A. Roberts, as comptroller of the State of New York, to certify and return to us at the office of the clerk of the county of Albany, in the city of Albany, New York, within twenty days after the service of this writ upon you, all and singular, your proceedings and decisions relative to the revision and readjustment of the account for taxes of the New York Central & Hudson River Railroad Company for the year ending June 30, 1896, with all the evidence, documents, reports, records, and papers relating thereto, or duly certified or sworn copies thereof, in your possession or under your control, submitted to or considered by you concerning the said account, and the grounds for your refusal to further revise and readjust the same, to the end that your said determination may be reviewed and corrected by this court both upon the law and the facts.

Witness : The Hon. Charles H. Truax, one of the justices of the Supreme Court, in and for the city and county of New York, at a Special Term thereof, Part I., held in the county court-house, in the city of New York, on the 21st day of December, 1897.

By the court.

BROWN & WELLS,

Attys. for Petitioner,

36 Wall Street, New York.

HENRY D. PURROY,

Clerk.

Indorsed :—"The within writ of *certiorari* is hereby allowed."

Dated New York, N. Y., Dec. 18, 1897.

CHARLES H. TRUAX,

J. S. C

Art. 3. Review by Certiorari of Determination of Comptroller.

Return to Writ of Certiorari.

SUPREME COURT—ALBANY COUNTY.

The People of the State of New York *ex rel.*
The New York Central & Hudson River
Railroad Company,

agst.

James A. Roberts, as Comptroller of the State
of New York.

To the Supreme Court of the State of New York :

James A. Roberts, comptroller of the State of New York, makes return to the writ of *certiorari* herein as follows :

1. That he is and has been since January 1, 1894, comptroller of the State of New York.

2. That he admits the truth of the allegations contained in paragraphs 1st, 3d, 4th, 5th, 6th, and 8th, and denies the truth of the allegations contained in paragraphs 2d and 7th of the petition herein.

3. That he returns the following accounts, documents, papers, and proceedings, and evidence :

- (a) Gross earnings, report received August 19, 1896.
- (b) Application for a rehearing, dated March 17, 1897.
- (c) Supplementary and revised report verified March 1, 1897.
- (d) The affidavit of Charles E. Patterson verified July 8, 1897, with Schedules "A," "B," "C," and "D" thereto annexed.
- (e) The evidence taken before the comptroller May 13, 1897.
- (f) The evidence taken before the comptroller September 1, 1897.
- (g) The charter of The New York Central & Hudson River R. R. Company.

4. That he further returns that he determined that the gross earnings including its gross earnings from its transportation and transmission business and business necessary and incidental thereto and part thereof, excluding earnings derived from business of an interstate character, amounted for the year ending June 30, 1896, to \$18,312,719.-38, and that the relator was properly taxable as and for an additional franchise tax measured by the above amount in the sum of \$91,563.60.

5. That in imposing the tax above described, the comptroller acted strictly in accordance with the law regulating his duties, and that his determination of the said amount of gross earnings was just and correct, and that the tax imposed on him as aforesaid is legal and justifiable, and should be sustained.

In witness whereof, I have hereunto set my hand and the [L. s.] seal of my office this 7th day of February, 1898.

JAMES A. ROBERTS,

Comptroller.

CHAPTER XXXIV.*

NATIONAL BANKRUPTCY LAW.

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ARTICLE I.

RELATION OF THE ACT TO STATE LAWS.

The right to pass uniform laws relative to bankruptcy is reserved to Congress by the Constitution. The first act for that purpose was passed 1800, and repealed after three years. The second act remained in existence two years, from 1841 to 1843. The third act was passed in 1867, and was finally repealed in 1878. The present law was passed in 1898, to take effect upon its passage, with the proviso that no petition for voluntary bankruptcy should be filed within one month after its passage, and no petition for involuntary bankruptcy within four months after its passage. The act contains provisions that proceedings commenced under State insolvency law before the passage of the act shall not be affected by it. A very full discussion as to bankruptcy and insolvency laws in England and America is contained in Albany Law Journal, vol. 21, pages 87 and 106, and vol. 22, page 66, and the difference between insolvency and bankruptcy laws considered and commented upon.

The National Bankruptcy Law, enacted in July, 1898, is necessarily of great importance in considering the method of dealing with insolvent debtors. The provisions of the Code and of the Revised Statutes relating to insolvent debtors, and perhaps general assignments, will necessarily fall largely into disuse by reason of the enactment of this statute, since neither the provisions for the discharge of insolvent debtors nor the General Assignment Act are sufficient to discharge a debtor from his debts except in so far as the provisions of the Two-Thirds Act are concerned. This act has been, however, little used, and has never been in much favor. No attempt will be made to give the

* Collier on Bankruptcy is the leading authority. Black on Bankruptcy also treats the subject.

Art. 1. Relation of the Act to State Laws.

practice under the Bankruptcy Act, as that is a matter entirely outside the scope of the present work ; but as a matter of convenience attention is called to the provisions of the act which define cases of bankruptcy and determine who may become bankrupts, being portions of §§ 3, 4, and 5 of chap. 3 of the act, and § 70 of chap. 7 of the act, which states what title to the property vests in the trustee of the estate of the bankrupt, as these provisions will serve to indicate the scope of the provisions of the act and aid in determining when it is necessary or advisable to proceed under the Bankruptcy Act.

An assignee in bankruptcy may, under the provisions of chap. 314 of the Laws of 1858, bring a creditor's action to set aside a fraudulent conveyance, although no creditor has obtained a judgment. *Southard v. Benner*, 72 N. Y. 424, 5 Abb. N. C. 184, affirming 7 Daly, 40. So an assignee in bankruptcy may maintain an action to set aside a chattel mortgage given by a bankrupt, though as to him it is valid, if from the circumstances the agreement under which it was given was fraudulent to the creditors. *Brackett v. Harvey*, 25 Hun, 502, citing *Southard v. Benner*, 72 N. Y. 424.

In *Dewey v. Moyer*, 72 N. Y. 70, it seems that if an assignee in bankruptcy refuses or neglects to sue for or reclaim property fraudulently transferred by a bankrupt, the creditors may commence an action to reach the property, making the assignee and the debtors and his transferees parties defendant ; and in such action the property will be administered directly for the creditors ; also, that when the assignee has lost the right to sue by not bringing an action within two years as limited by the then bankrupt law, the creditors may bring the action in their own names.

When Congress exercises its power under the Constitution and establishes a system of bankruptcy, the law enacted by it is paramount and superior to other laws relating to the same subject-matter. The State Laws on the subject of insolvency are not repealed by the Bankruptcy Law, but their operation and effect is suspended as long as the National Bankruptcy Law remains a statute. Collier on Bankruptcy, 428, citing *Sturgis v. Crowninshield*, 4 Wheat. 122 ; *Baldwin v. Hale*, 1 Wall. 223 ; *Blanchard v. Russel*, 13 Mass. 1 ; *Betts v. Bagley*, 29 Mass. 572 ; *In re Reynolds*, 8 R. I. 845 ; S. C. 9 B. R. 50 ; *Adams v. Storey*, 1 Paine, 79 ; *Ogden v. Saunders*, 12 Wheat. 213.

Art. 2. Citations from Federal Act.

The weight of authority is that after the passage of the Bankruptcy Act the insolvency laws of the State are in abeyance. In *Shyrook v. Dashore*, 13 B. R. 481, cited in Collier on Bankruptcy 429, it is said that the decided cases on this point arrange themselves in three classes, and authorities are cited to that view. First, those which hold that the passage of the Bankrupt Law in and of itself suspended the State law on the same subject so that they could not operate upon persons or cases within the purview of the Bankrupt Act. Second, those which hold that though the State law operates on cases within the purview of the Bankruptcy Law, yet if is not in itself repugnant to the Bankruptcy Law, but consistent with its main provisions, it is not in abeyance until the Bankruptcy Law is put in force in the courts of the United States, though until then it does not impede the operation of the Bankruptcy Law. Third, those which assert that the State laws, whether repugnant or not, exist and operate with full force and vigor until the Bankruptcy Law attaches upon the person or property of the bankrupt, and that is not until it is judicially ascertained that the petitioner is a person entitled to the benefits of the bankruptcy first by being declared a bankrupt by a decree of the court.

Upon the theory that general assignments for the benefit of creditors, valid at common law, are not in their object or nature similar to bankruptcy proceedings, it was held, in *Mayer v. Hellman*, 91 U. S. 946, that a State statute which merely attempted to regulate such assignments and did not create the right was not suspended by the Bankruptcy Law. The conclusion of Mr. Collier on the subject (page 430) is "that the weight of authority is that the Bankruptcy Law suspends any State insolvency law whose general object is the same as that of the Bankruptcy Law, and which acts upon the same persons and has practically the same scope and effect."

ARTICLE II.

CITATIONS FROM FEDERAL ACT. §§ 3, 4, 5, 70 in part.

§ 3. Acts of bankruptcy.

(a) Acts of bankruptcy by a person shall consist in his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered

 Art. 2. Citations from Federal Act.

or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

(b) A petition may be filed against the person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors, or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property, unless the petitioning creditor has received actual notice of such transfer or assignment.

(c) It shall be a complete defence to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing of the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one, the burden of proving such solvency shall be on the alleged bankrupt. * * * *

§ 4. Who may become bankrupts.

(a) Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt.

(b) Any natural person, except a wage-earner or a person engaged chiefly in farming or the tilling of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt, upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts.

§ 5. Partners.

(a) A partnership, during the continuation of the partnership business, or after its dissolution, and before the final settlement thereof, may be adjudged a bankrupt.

(b) In the event of one or more, but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner, or partners, not adjudged bankrupt, but such partner or partners, not adjudged bankrupt, shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.

§ 70. Title to property.

(a) The trustee of the estate of a bankrupt upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall, in turn, be vested by operation of law, with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for

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some other person ; (4) property transferred by him in fraud of his creditors ; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him ; provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate or personal representatives he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustees as assets ; and (6) rights of action arising upon contracts or from the unlawful taking, or detention of, or injury to, his property. * * * *

CHAPTER XXXV.

GENERAL ASSIGNMENT.*

Chapter 466, Laws 1877.

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ARTICLE I.

COMMON LAW AND STATUTORY REGULATIONS. §§ 1, 28.

§ 1. Title.

This act may be cited for all purposes as "The general assignment act of eighteen hundred and seventy-seven."

L. 1877, ch. 466, § 1.

§ 28. Chapter three hundred and forty-eight of the Laws of eighteen hundred and sixty, entitled "An act to secure to creditors a just division of the estates of debtors who convey to assignees for the benefit of creditors," and the several acts amendatory thereof, are hereby repealed; but this shall not affect any proceedings had, and any proceedings pending under the acts hereby referred to may be continued under this act.

General assignments for the benefit of creditors are not treated in the Code of Civil Procedure, but a general assignment is a special proceeding and is treated as such. *Matter of Thorn*, 10 Daly, 71; *Matter of Potter*, 8 St. Rep. 261. It is therefore treated in this work in connection with other special proceedings. It is also very closely allied in its objects to proceedings with reference to insolvent debtors, so that a treatise on practice in special proceedings would be incomplete if it failed to treat of this subject.

General assignments for the benefit of creditors were not, in the first instance, provided for, or even regulated, by statute. They arose as a matter of practice and as such grew up in this country. *Dunham v. Waterman*, 17 N. Y. 9. They were first regulated by statute in this State in 1860, and certain restrictions placed upon them, and the manner in which the trust should be executed pointed out and regulated. In 1877 the General Assignment Law was enacted in substantially its present form, retaining

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all the features of the act of 1860, but being more thorough in its details and far-reaching in its provisions. Provisions with regard to preferences have been added and amendments made from time to time. The arrangement of the statute cannot be commended, and it does not seem to have been drawn with that degree of care and skill that a matter of such importance would seem to demand. A large number of adjudications have been made under this and previous statutes. In *Ludington's Petition*, 5 Abb. N. C. 307, Austin Abbott, as referee, states the history of legislation on this subject. He says that "The policy of legislation with regard to general assignments has been to secure publicity, by acknowledgment and record, and to subject the assignors and their estates, from the time of the making of the assignment, to the summary jurisdiction of the court; to require the assignee to give security promptly, as a condition of his power to convert and apply assets under it; to authorize the assignee to gain possession of all the assets, by compelling debtors to make discovery; and to authorize the assignee to ascertain who claim as creditors by advertising for claims, and requiring verified vouchers; lastly, to provide a simple and direct method of accounting, modeled upon that provided for executors and administrators." He adds that the jurisdiction of the court is similar to that exercised by surrogates, and that the practice of administering estates of decedents is a proper guide in the interpretation and application of analogous provisions of the General Assignment Statute.

The common-law assignment for the benefit of creditors is a means or mode chosen by the assignor for the distribution of his property among his creditors. It is also a contract with them, the validity of which depends upon their assent. It is understood to mean a transfer by the debtor of all his property to the assignee for the payment of his debts, by which the assignor completely divests himself of the title to the assigned property. Am. & Eng. Ency. of Law, 2d ed., vol. 3, p. 5.

The essential elements of such assignment is the voluntary conveyance of the debtor's property in trust to sell the assigned property and distribute the proceeds among his creditors. Bishop on Insolvent Debtors, 110.

"The assignment is not like a gift of property upon conditions open to the acceptance or rejection of the donee. It is a pay-

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ment by the assignor of his debts upon his own plan. The deed of assignment is in no sense a contract between the debtor and his creditors, and it does not depend for its validity in law upon their assent. It is a means or mode which the statute permits to be adopted by an insolvent debtor for the distribution of his estate among his creditors, and so long as he has acted without fraud, in fact or in law, and has complied with the prescriptions of the act, his conveyance to an assignee for the purposes stated therein will stand and be effective. If the distribution is to be made unequally among the creditors and some are preferred to others in payment, the assignment is not viewed by the courts with any favor, and is only tolerated and upheld when all conditions are met for the prevention of fraud. (*Nichols v. McEwen*, 17 N. Y. 22.) The debtor's proceeding sets at naught whatever elements of superiority the non-preferred creditor's claim may possess, as it may nullify the results of any diligent effort on his part to secure his debt. It compels him to submit to inequality in payment and to take his *pro rata* share of the estate, unless he discovers and can establish its invalidity." *Mills v. Parkhurst*, 126 N. Y. 94.

In order to constitute a general assignment there must be a voluntary conveyance or transfer of the whole of the debtor's property. *Lewis v. Miller*, 23 Week. Dig. 495; *Tiemeyer v. Turnquist*, 85 N. Y. 516; *Knapp v. Macgowan*, 96 N. Y. 75; *Royer Wheel Co. v. Fielding*, 101 N. Y. 504. The property is conveyed in trust to the assignee, who takes title for the performance of his trust duties only and must convert the estate into money. *Brown v. Guthrie*, 110 N. Y. 435; *Hine v. Bowe*, 46 Hun, 146, affirmed, 114 N. Y. 350.

It is not necessary that the creditors should assent to such assignment, but such assent is presumed. *Cunningham v. Freeborn*, 11 Wend. 240. It is an act of duty by the debtor to his creditors to make the fund available for their benefit, and the debtor may at any time before his property passes from his control assign it to trustees for distribution among his creditors. *Nicoll v. Mumford*, 4 Johns. Ch. 522. And this is true, although it may embarrass, hinder, and delay his creditors. *Nicholson v. Leavitt*, 6 N. Y. 510; *Jacobs v. Remsen*, 36 N. Y. 668; *Hauselt v. Vilmar*, 76 N. Y. 630.

Voluntary assignments are so called because they are the free-

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will act of the debtor, are not due to any compulsion of law, and are without consideration. This lack of consideration and the presence of the trust is a distinguishing characteristic between assignments and a sale, to which they are sometimes compared. The assignment must be absolute, free from all reservations, by which the grantor divests himself of his legal and equitable estate, and deprives those claiming under him of any legal or equitable rights in the property. In other words, all the debtor's property passes to the assignee. Headley on Assignments, 21, citing *Briggs v. Davis*, 21 N. Y. 574, and other authorities.

Previous to the enactment of the statute in this State, and until the enactment of the statute of 1877 regulating the control of general assignments, they were looked upon with some disfavor by the courts, and set aside upon technical grounds which would not be considered insufficient to affect their validity. The current of recent authority upon the subject is decidedly in favor of sustaining general assignments, particularly where they are made without preferences, in this respect showing a marked change in the trend of authority. See *Mayer v. Hellman*, 91 U. S. 496-500; *Reed v. McIntyre*, 98 U. S. 507. In the latter case the decision by Justice Harlan says: "The right of the debtor at common law to devote his whole estate to the satisfaction of the claims of his creditors results, as Chief Justice Marshall held, from that absolute ownership which a person has over that which is his own. *Brasher v. West*, 7 Peters, 608; *Mayer v. Hellman*, 91 U. S. 496. Assignments of property for such purpose, not made with intent to hinder, delay, or defraud creditors, were upheld at common law, even where certain articles were preferred in the distribution of the debtor's effects." A very full history of legislation on this subject will be found in Bishop on Insolvent Debtors, p. 118.

It will be noticed that the provisions of the statute regulating general assignments extend to assignments of this character, but it does not attempt to define their purpose or intent in any way, but **only** to determine the form and manner of execution and procedure for the purpose of carrying out its intent.

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ARTICLE II.

REQUISITES OF ASSIGNMENT. § 2.

SUB. 1. WHO MAY ASSIGN AND TO WHOM.

2. FORM AND CONTENTS OF ASSIGNMENT.
3. VALIDITY AND EFFECT OF ASSIGNMENT.
4. INTERPRETATION AND CONSTRUCTION OF ASSIGNMENT.

SUB. 1. WHO MAY ASSIGN AND TO WHOM.

§ 2. To be in writing; contents; acknowledgment; recording; assent of assignee.

Every conveyance or assignment made by a debtor of his estate, real or personal, or both, to an assignee for the creditors of such debtor, shall be in writing, and shall specifically state therein the residence and kind of business carried on by such debtor at the time of making the assignment, and the place at which such business shall then be conducted, and if such place be in a city, the street and number thereof, and if in a village or town such apt designation as shall reasonably identify such debtor. Every such conveyance or assignment shall be duly acknowledged before an officer authorized to take the acknowledgment of deeds and shall be recorded in the county clerk's office in the county where such debtor shall reside or carry on his business at the date thereof. An assignment by co-partners shall be recorded in the county where the principal place of business of such co-partners is situated. When real property is a part of the property assigned, and is situated in a county other than the one in which the original assignment is required to be recorded, a certified copy of such assignment shall be filed and recorded in the county where such property is situated. The assent of the assignee, subscribed and acknowledged by him, shall appear in writing embraced in or at the end of, or indorsed upon the assignment, before the same is recorded, and, if separate from the assignment, shall be duly acknowledged.

Laws 1877, ch. 466, § 2, as amended L. 1888, ch. 249.

It will be seen that this provision assumes the existence of assignments of this character, and does not attempt to define their purpose or intent in any way, but simply to determine the form and manner of execution in the most general way. The right to make a general assignment, with preferences, grows out of the right of an individual to pay such of his creditors and in such manner as he pleases, provided the others are not defrauded. It is an act of duty by the debtor to his creditors to make the fund available for their benefit, and a debtor may at any time, before his property passes from his control, assign it to trustees for distribution among his creditors. *Nicoll v. Mumford*, 4 Johns. Cas. 522. And this is true though it may incidentally hinder and delay his creditors. *Nicholson v. Leavitt*, 6 N. Y. 510; *Jacobs v. Receiver*, 36 id. 669; *Hauselt v. Vilmar*, 76 id. 630. And the assignment may be made by any person capable of making a contract. *Fox v. Heath*, 21 How. 384.

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But one co-partner cannot assign the co-partnership property that it is not within the scope of the co-partnership agreement, and cannot be implied from it. *Fisher v. Murray*, 1 E. D. Smith, 41; *Adce v. Cornell*, 25 Hun, 78; *Welles v. March*, 30 N. Y. 344; *Coope v. Bowles*, 42 Barb. 87; *Gates v. Andrews*, 37 N. Y. 657. If authorized to do so by his co-partner, one may execute the assignment, and such consent may be implied. *Roberts v. Shephard*, 2 Daly, 110; *Kelly v. Baker*, 2 Hill, 531; *Baldwin v. Tyrnes*, 19 Abb. 32. Or it may be ratified by the other partner even though an infant. *Coope v. Bowles*, 42 Barb. 87; *Adce v. Cornell*, 93 N. Y. 572; *Sheldon v. Smith*, 28 Barb. 593. The fact that a partner has absconded will authorize the other partner or partners to execute a general assignment. *Welles v. March*, 30 N. Y. 344; *Palmer v. Meyers*, 43 Barb. 509; *National Bank v. Sackett*, 2 Daly, 397; *Lowenstein v. Flauraud*, 82 N. Y. 494. But this must not be a mere absence from the county without intent to defraud creditors. *Pettee v. Orser*, 6 Bos. 123; *Coope v. Bowles*, 42 Barb. 87. After dissolution, when the partnership assets have been transferred in good faith to continuing partners, they may assign the property transferred for the payment of their debts, but it must be without intent to defraud former creditors. *Smith v. Howard*, 20 How. 121; *Dimon v. Hazard*, 32 N. Y. 65; *Paton v. Wright*, 15 How. 481; *Heye v. Bolles*, 2 Daly, 231; *Hard v. Mulligan*, 8 Abb. N. C. 58; *Mattison v. Demarest*, 4 Rob. 161; *Lester v. Pollock*, 3 id. 691.

As to the right of a surviving partner to make an assignment, no question seems to have arisen, but the power to make preferences in such a case does not seem to be clearly settled. It was upheld in *Loeschigk v. Addison*, 4 Abb. (N. S.) 210, where the assignment was made directly to the creditor, and was questioned in *Hutchinson v. Smith*, 7 Paige, 26, where the assignment was to a trustee. It was also upheld in *Williams v. Whedon*, 39 Hun, 98, although liable to be set aside by representatives of deceased partner. See elaborate note, Abb. Dig., 1886, p. 20. A partner may assign his interest in the firm property, subject to payment of firm debts. *Kirby v. Schoonmaker*, 3 Barb. Ch. 46; *Haggerty v. Granger*, 15 How. 243; *Menagh v. Whitwell*, 52 N. Y. 146; *Davis v. Grove*, 27 How. 70. An assignment may be made by a limited partnership, but it will be void if it provides for payment of a debt due to the special partner before all the other creditors

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are paid. *Mills v. Argall*, 6 Paige, 577; *Van Alstyne v. Cook*, 25 N. Y. 492. And the general partners in a limited partnership cannot make an assignment with preferences under 1 R. S. §§ 20, 21. In such case when an assignment with preferences was sought to be made, and afterward a second assignment was made by the same parties to the same assignee, the latter assignment was held valid. *Schwartz v. Soutter*, 103 N. Y. 683. An assignment executed only by the general partner is valid. *Robinson v. McIntosh*, 3 E. D. S. 221; *Darrow v. Bruff*, 36 How. 479. In assignments by a firm, the partnership property must be first applied to pay firm debts. *Bogart v. Haight*, 9 Paige, 296; *Scott v. Guthrie*, 25 id. 512; *Wilson v. Robinson*, 21 N. Y. 587; *Walsh v. Kelley*, 42 Barb. 98; *Egbert v. Wood*, 3 Paige, 517; *Grover v. Wakeman*, 11 Wend. 187; *Leslie v. Wallack*, 3 Robt. 691. And if otherwise applied the assignment is void. *Bank of Granville v. Cohen*, 6 St. Rep. 318. And it cannot provide for payment of individual debts out of the surplus *pro rata* in case the individual debts of the different members of the firm are unequal. *Crook v. Rindskopf*, 21 Week. Dig. 31. Although partnership debts may be preferred by a member of the firm out of his individual assets. See *Royer Wheel Co. v. Fielding*, 101 N. Y. 504; *O'Neil v. Salmon*, 25 How. 246; *Van Rossum v. Walker*, 11 Barb. 237; *Kirby v. Schoonmaker*, 3 Barb. Ch. 46. Where one partner has diverted trust funds, the firm cannot give a preference for their payment, and the assignment attempting to do so is void. *Denton v. Merrill*, 5 St. Rep. 387. Individual debts cannot be paid out of firm assets till firm debts are paid. *Walsh v. Kelley*, 42 Barb. 98; *Jackson v. Cornell*, 1 Sandf. Ch. 348; *Wilson v. Robinson*, 21 N. Y. 587. The case is otherwise where the debt of the individual member has been assumed by the firm. *Turner v. Jaycox*, 40 Barb. 164. It may be shown that the preference of individual debts out of firm property was without intent to defraud. *Cox v. Platt*, 32 Barb. 126. But in case of such an assignment, the burden rests on the assignee to show that the individual assets are sufficient to pay the individual debts. *Knauth v. Bassett*, 34 Barb. 31. Where an assignment contemplated the appropriation of all the partnership and individual property of each partner first to the payment of the partnership debts; second, the surplus, if any, due each partner, to the payment of his individual debts, it was held that the assignment was

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not fraudulent as to the individual creditors of either partner, because his individual property is applied to payment of firm debts. *Becker v. Leonard*, 3 St. Rep. 765.

A general assignment of the assets of a general partnership for the benefit of creditors may be legally executed in the name of the firm by one of the partners, if done by the oral assent of all the partners. *Hooper v. Baillie*, 118 N. Y. 413; *Klumpp v. Gardner*, 114 N. Y. 154, distinguishing *Sutherland v. Bradner*, 116 N. Y. 410. A general assignment may be made by any person capable of making a contract. *Fox v. Heath*, 21 How. Pr. 384. But one co-partner cannot assign the co-partnership property, for to do so is not within the scope of the partnership agreement and cannot be implied from it. *Fisher v. Murray*, 1 E. D. Smith 341; *Adee v. Cornell*, 25 Hun, 78; *Welles v. March*, 30 N. Y. 344; *Coope v. Bowles*, 42 Barb. 87; s. c. 18 Abb. Pr. 422, 28 How. Pr. 10; *Havens v. Hussey*, 5 Paige, 30; *Gates v. Andrews*, 37 N. Y. 657. However, if a co-partner is authorized to do so by his partners, one may execute such assignment; such authority may be either oral or written. *Roberts v. Shepard*, 2 Daly, 210; *Nat. Bk. of Troy v. Scriven*, 63 Hun, 375; *Martine v. Robinson*, 78 Hun, 115, 60 St. Rep. 498; *Kelly v. Baker*, 2 Hilt. 531; *Baldwin v. Tynes*, 19 Abb. Pr. 32.

It may be ratified by the other partner, even though an infant. *Coope v. Bowles*, 42 Barb. 87; *Adee v. Cornell*, 93 N. Y. 572; *Sheldon v. Smith*, 28 Barb. 593. While one or more of the partners cannot execute a general assignment without the consent of all, if it appears by the acts or declarations before or after the assignment of the partners who did not sign that they assented to it, it is valid. *Klumpp v. Gardner*, 114 N. Y. 153. A general assignment relating solely to the property of partners, all of which is personal, and reciting that it is made by the firm to which the firm name is subscribed by one of the partners, who declares in the certificate of acknowledgment "that he executed the same as and for said firm (giving its name) and under its authority and instructions of the members of said firm," is not void on its face by reason of the manner of its execution; such an assignment may be legally executed in the name of the firm by one of the partners if done with the oral assent of all. *Hooper v. Baillie*, 118 N. Y. 413; s. c. 135 N. Y. 617; to the same effect see *Heald v. MacGowan*, 15 Daly, 233, 25 St. Rep. 579; *Sherman v.*

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Jenkins, 70 Hun, 593. But temporary insanity of one partner will not authorize the other partner to make a general assignment. *Stadelman v. Lochr*, 47 Hun, 327.

A resident of a State of which the laws forbid the making of a preferential assignment and which declare it void, doing business in this State, may make a valid preferential assignment here. *Smedley v. Smith*, 15 Daly, 421, 28 St. Rep. 414, 8 Supp. 100, affirmed, 126 N. Y. 637. After dissolution assignment may be made by continuing partners. *Stanton v. Westover*, 101 N. Y. 265; *Crane v. Roosa*, 40 Hun, 455; *Burhans v. Kelly*, 17 St. Rep. 552. Surviving partner may make an assignment. *Williams v. Whedon*, 109 N. Y. 333; *Haynes v. Brookes*, 116 N. Y. 487; *Durant v. Pierson*, 124 N. Y. 444; *Beste v. Berger*, 17 Abb. N. C. 162, affirmed, 110 N. Y. 644. Assignment by liquidating partner containing preferences is not merely voidable, but void. *Schwartz v. Soutter*, 103 N. Y. 683. But if made in good faith for the equal benefit of all creditors it will be valid. *Robinson v. McIntosh*, 3 E. D. Smith, 221; *Jackson v. Sheldon*, 9 Abb. Pr. 127.

Where a member of a firm who defends an action to set aside an assignment for the benefit of creditors, on the ground of his not assenting, it is a ratification of the assignment. *Hooper v. Beecher*, 39 St. Rep. 320, 15 Supp. 113. Where one partner is authorized by letter of an absent partner to make an assignment for the benefit of creditors, he may make a general assignment. *Hald v. McGowan*, 15 Daly, 233, 25 St. Rep. 577, 5 Supp. 450; see, also, *Hooper v. Baille*, 118 N. Y. 413, reported 29 St. Rep. 52, reversing 7 St. Rep. 415; *Martine v. Robinson*, 78 Hun, 115. In the latter case it is held it is not necessary to show an express consent to the execution of a general assignment for the benefit of creditors by a partner not executing it, as his assent may be inferred. s. c. reported 28 Supp. 1056, 60 St. Rep. 498.

Corporations independent of the statute can make general assignments for the benefit of creditors. *Coats v. Donnell*, 94 N. Y. 168. But chapter 325, Laws of 1825, enacts that it is not lawful for an incorporated company to make any transfer or assignment in contemplation of insolvency, and declares any such assignment void. *Harris v. Thompson*, 15 Barb. 62; *Sibell v. Remsen*, 33 N. Y. 95. *Loving v. Vulcanizing Co.*, 36 Barb. 329; *Bowen v. Lease*, 5 Hill, 221; *Paulding v. Chrome Steel Co.*, 94 N. Y. 334. This rule applies to banking associations. *Dutcher v. Importers*

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& *Traders' National Bank*, 59 N. Y. 5; *Robinson v. Bank of Attica*, 21 id. 406. But it seems other moneyed corporations are exempted by the same statute, but they cannot give preferences. *Marine Bank v. Clements*, 31 N. Y. 33; *Curtis v. Leavitt*, 15 id. 9; *Hill v. Reed*, 16 Barb. 280; *Hulbut v. Carter*, 21 id. 221.

An assignment made for the benefit of creditors in this State by an insolvent foreign corporation, valid under the laws of its domicil, will be recognized as valid in this State. *Vanderpoel v. Gorman*, 140 N. Y. 563; *Rogers v. Pell*, 154 N. Y. 518. It was held in that case that where an insolvent foreign corporation by its board of directors passed resolutions "that the company execute a general assignment," without especially deputing any one to do so, that it authorized its president to make an assignment for the company. It is well settled that, independent of statute, a corporation can make an assignment for the benefit of its creditors. *DeRuyter v. Trustees of St. Peter's Church*, 3 Barb. Ch. 119, 124, affirmed, 3 N. Y. 238; *Haxton v. Bishop*, 3 Wend. 13; *Coates v. Donnell*, 94 N. Y. 168; *Vanderpoel v. Gorman*, 140 N. Y. 563.

As early as 1825, however, the legislature of this State passed an act prohibiting corporations from making assignments in contemplation of insolvency, and declared such assignments void. This was incorporated in the Revised Statutes, and as amended from time to time remained the law of the State up until 1890, when provisions of like character were incorporated in the Stock Corporation Law. In 1892 the provisions of the Stock Corporation Law on this subject were amended so as to read as follows :

§ 48. Prohibited transfers to officers or stockholders.

No corporation which shall have refused to pay any of its notes or other obligations when due, in lawful money of the United States, nor any of its officers or directors, shall transfer any of its property to any of its officers, directors, or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property paid in cash. No conveyance, assignment, or transfer of any property of any such corporation by it or by any officer, director, or stockholder thereof, nor any payment made, judgment suffered, lien created, or security given by it or by any officer, director, or stockholder when the corporation is insolvent or its insolvency imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid.

The statute as it stood before the repeal applied to banking associations. *Dutcher v. Imp. & Tr. Nat. Bank*, 59 N. Y. 5.

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There does not seem to be any express provision of law prohibiting assignments except in cases of preferences by banking associations, whatever view may be taken by the courts as to the policy of allowing such assignments, in view of the statutory provisions on the subject. It seems that moneyed corporations, other than banking corporations, were not included under the statute prohibiting general assignments, although prohibited from giving preferences. *Marine Bank v. Clements*, 31 N. Y. 33; *Curtis v. Leavitt*, 15 N. Y. 9; *Hurlbut v. Carter*, 21 Barb. 221; *Hill v. Reed*, 16 Barb. 280. It is said in *Croll v. Empire State Knitting Company*, 17 App. Div. 282, third department, May, 1897, that the inference to be drawn from the fact that the Revised Statutes, which in effect forbade insolvent corporations from making an assignment for the benefit of creditors, was repealed by § 48 of the Stock Corporation Law (which latter section, as amended by chap. 688 of the Laws of 1892, provides that "no corporation which shall have refused to pay any of its notes or other obligations when due * * * shall transfer any of its property * * * for the payment of any debt or upon any other consideration than the full value of the property paid in cash. Any conveyance, assignment, or transfer of any property of any such corporation by it * * * when the corporation is insolvent or its insolvency is imminent with the intent to give a preference to any particular creditor over other creditors of the corporation shall be invalid"), is that of the common-law right of a corporation, insolvent, to make a general assignment for the benefit of its creditors, is restored subject to the condition that the assignment must be without preferences. Citing *Vanderpool v. Gorman*, 140 N. Y. 568; *Home Bank v. Brewster Co.*, 17 Misc. 442, 15 App. Div. 338, in support of that view.

The assignee must be named in the assignment,—a provision for a new assignee in case of resignation of the person named is void. *Planck v. Schermerhorn*, 3 Barb. Ch. 644. Any person may be selected as assignee, subject to the power of the court to remove any incompetent person. *Cram v. Mitchell*, 1 Sandf. Ch. 251; *Webb v. Daggett*, 2 Barb. 11. A creditor may be assignee. *Hawley v. Mancius*, 7 Johns. Ch. 174. But a creditor who accepts the trust cannot enforce a judgment he may hold by execution. *Rogers v. Rogers*, Hopk. Ch. 515. Nor can a firm assign to one of the partners. *Seawall v. Ursell*, 2 Paige, 175. The se-

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lection of a relative or friendly assignee may, however, be strong and almost conclusive evidence of a fraudulent intent in making the assignment. *Currie v. Hart*, 2 Sandf. Ch. 353; *Cram v. Mitchell*, 1 id. 251; *Reed v. Emery*, 8 Paige, 417; *Connah v. Sedgwick*, 1 Barb. 210; *Browning v. Hart*, 6 id. 91. More than one person may be named, although all need not act, but all who qualify must act, or be discharged by the court or the creditors. *Brennan v. Wilson*, 4 Abb. N. C. 279; *Thatcher v. Candee*, 3 Keyes, 160; *Diefendorf v. Spraker*, 10 N. Y. 246; *Moir v. Brown*, 14 Barb. 39.

A foreign corporation has power to make a general assignment for creditors under the laws of this State, if such assignment would be valid under the law of its domicil. *Rogers v. Pell*, 154 N. Y. 518, 49 N. E. Rep. 75. A resolution of the board of directors "that the company execute a general assignment," which does not designate any person to act, authorizes the president to execute the instrument. *Rogers v. Pell*, 154 N. Y. 518, 49 N. E. Rep. 75.

A resolution authorizing the execution of a general assignment to a trustee to be nominated by the president does not authorize the president to select himself as assignee, but his act in so doing is not void, but only voidable at the election of the company. *Rogers v. Pell*, 154 N. Y. 518, 49 N. E. Rep. 75.

An assignment which was valid in the State of its domicil, when made by a foreign corporation, will be recognized as valid here, so as to permit assignee to sue for possession of its assets here, where the assignment does not conflict with the claims of domestic creditors. *Franzen v. Zimmer*, 90 Hun, 103, 70 St. Rep. 407, 35 Supp. 612. It was held at Special Term in the case of *Home Bank v. Brewster*, 17 Misc. 442, that a domestic corporation has a right, under § 48 of the Stock Corporation Law, to make a general assignment without preferences. It was held that the case of the *Troy Waste Man'f'g Co. v. Harrison*, was no longer an authority; this decision is based upon *Vanderpoel v. Gorman*, 140 N. Y. 563.

In the absence of a statute forbidding it, an assignment for the benefit of creditors may be made to an assignee who is not a citizen or resident of the State where the assignment is made, or where the debtor resides. *Bachrack v. Norton*, 132 U. S. 337. An assignment may be made to a relative or creditor. *Shultz v. Hoag-*

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land, 85 N. Y. 464. Although it is said that a judgment creditor by accepting office of assignee waives his right to enforce the judgment by levy and sale under execution. *Hawley v. Mancius*, 7 Johns. Ch. 174; *Rogers v. Rogers*, Hopk. Ch. 515. But an assignment cannot be made by the partners to one member of the firm. *Swall v. Russell*, 2 Paige, 175. The assignee, however, has no liberty or choice in selecting a successor to himself. *Cram v. Mitchell*, 1 Sandf. Ch. 251; *Planck v. Schermerhorn*, 3 Barb. Ch. 644.

Where an assignment names several assignees and provides that they must all act in order to render the assignment valid, all must accept or the assignment is void. *Brennan v. Wilson*, 71 N. Y. 502. Under the same authority is found the rule that when more than one accept, all accepting must act.

The power in an assignment to name a successor to the assignee in case he wishes to resign vitiates the assignment. *Planck v. Schermerhorn*, 3 Barb. Ch. 644. The earlier cases held that the appointment of an insolvent assignee was evidence of fraud on the part of the assignor. *Reed v. Emery*, 8 Paige, 417; *Haggarty v. Pittman*, 1 Paige, 298. This view is now no longer held in view of the provision requiring a bond from the assignee of an amount sufficient to protect creditors. *Friend v. Michaelis*, 15 Abb. N. C. 354; *Bostwick v. Burnett*, 74 N. Y. 317; *In re Padock*, 6 How. 215; *Pearce v. Beach*, 12 How. 404.

In *Matter of Mellen*, 45 St. Rep. 349, Van Brunt, J., speaking for the court, says: "It seems to us that this record exemplifies to a striking degree the impropriety of the appointment of an assignee for the benefit of creditors who is a non-resident of the State. Although it is now claimed that the assignee in question appointed an attorney to appear in all proceedings which might be brought against him, it is apparent from the facts upon this record that service of the papers upon the assignee was impeded to such an extent by such non-residence that he was enabled to delay his appearance because thereof. Although this of itself would not have been sufficient to justify the removal of the assignee, there are other facts disclosed which shows that no other conclusion could have been arrived at. See, also, upon this point, *Blackington v. Goldsmith*, 3 How. Pr. (N. S.) 77; *Nat. Park Bk. v. Whitmore*, 40 Hun, 499, appeal dismissed, 104 N. Y. 297.

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SUB. 2. FORM AND CONTENTS OF ASSIGNMENT.

The assignment usually recites a nominal consideration from the assignee to the assignor, but it is not absolutely necessary. *Cunningham v. Freeborn*, 11 Wend. 240; *Kellogg v. Slauson*, 11 N. Y. 302; *Rockwell v. McGovern*, 69 id. 294. And it must describe the property assigned with reasonable certainty by way of general description, showing it to be all of the assignor's property. The property is described with particularity by the schedules which are part of the assignment. *Terry v. Butler*, 43 Barb. 395; *Matthews v. Poultney*, 33 id. 127; *Turner v. Jaycox*, 40 N. Y. 470; *Platt v. Lott*, 17 id. 478; *De Camp v. Marshall*, 2 Abb. (N. S.) 373.

The assignment must be in writing, acknowledged and recorded; must show upon its face all the creditors whom the assignor intends to prefer; a power reserved therein to the assignor or assignee to designate future preferences renders the assignment void. The instrument must definitely settle the respective rights of the creditors. *Frazier v. Truax*, 27 Hun, 587; *Sheldon v. Dodge*, 4 Denio, 217. Although in *Van Vliet v. Slauson*, 45 N. Y. 317, other papers bearing the same date and relating to the same subject-matter were read together as constituting an assignment of the property in trust for the benefit of creditors.

"An assignment drawn precisely as it ought to be will not undertake to speak to the assignee in regard to his duties under the trust. Those duties, unless the creditors themselves direct otherwise, are simply to convert the estate and pay the debts in the order and with the preferences indicated in the instrument." Opinion of Comstock, J., in *Ogden v. Peters*, 21 N. Y. 24. It should not contain conditions, nor invest the assignee with powers, which tend in any degree to vary or modify his legal duties. *Jessup v. Hulse*, 21 N. Y. 168.

In *Litchfield v. White*, 3 Sandf. 545, affirmed, 7 N. Y. 438, the court said: "We have never heard of a case, nor do we believe that there has ever been one decided in this State, in which an assignment has been held fraudulent, which simply vests the debtor's estate in the trustees, and directed them to convert it into money and apply it absolutely and without reserve to the payment of his debts either equally among all his creditors or with preferences." *Dunham v. Waterman*, 17 N. Y. 9.

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General assignments of all the property of the assignor, real and personal, will vest title to land. *Raynor v. Raynor*, 21 Hun, 36. An assignment for the payment of debts without limitations confers on the assignee the right to sell. *Cooper v. Whitney*, 3 Hill, 95; *Planck v. Schermerhorn*, 3 Barb. Ch. 644.

It must not reserve to the assignee or assignor any control over the property. *Kercheis v. Schloss*, 49 How. Pr. 284; *Riggs v. Murray*, 2 Johns. Ch. 565. It may provide for the payment of the expenses of administering the trust. *Meacham v. Sternes*, 9 Paige, 398; *Jacobs v. Remsen*, 36 N. Y. 668. But authority to pay counsel fees in addition to expenses, costs, etc., or a direction to pay counsel fees for services to be rendered after the assignment, will invalidate assignment. *Nicholls v. McEwan*, 21 Barb. 65; *Dunham v. Waterman*, 17 N. Y. 22; *Norton v. Matthews*, 7 Misc. 569; *Matter of Gordon*, 49 Hun, 370; *Mead v. Phillips*, 1 Sandf. Ch. 83.

If creditors are preferred they must be stated with certainty, and if their names and amounts are contained in a schedule such schedule must be annexed to the assignment when executed. *Hotop v. Neikig*, 17 Abb. Pr. 332; *Frazier v. Truax*, 27 Hun, 587; *Kercheis v. Schloss*, 49 How. 284. The assignment must be acknowledged by the assignor and assignee. *Hardmann v. Bowen*, 39 N. Y. 196; *Fairchild v. Gwynne*, 16 Abb. Pr. 23; *Britton v. Lorenz*, 45 N. Y. 51. Although it is not necessary that the assent and acknowledgment of the assignee should be embraced in and indorsed upon the assignment, it may be upon a separate paper and recorded at a different time from the recording of the assignment. *Francy v. Smith*, 125 N. Y. 44; no particular form of consent being prescribed. *Scott v. Mills*, 45 Hun, 263, affirmed, 115 N. Y. 376.

But an assignment recorded without the assent and acknowledgement of the assignee, though he may have orally agreed to act, is void. *Rennie v. Bean*, 24 Hun, 123. Where the assignment is made by several persons it must be acknowledged by all. *Cook v. Kelley*, 12 Abb. Pr. 35, affirmed in 14 id. 466; *Treadwell v. Sackett*, 50 Barb. 440. Unless some of the partners are non-residents. *Darrow v. Bruff*, 36 How. 479. Or absconded. *Welles v. March*, 30 N. Y. 344. An acknowledgment by an attorney in fact is sufficient. *Lowenstein v. Flauraud*, 11 Hun, 399, affirmed, 82 N. Y. 494. The fact that an assignment is in-

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valid for want of acknowledgment is not a defence to assignee claiming under assignment. *Randall v. Dusenbury*, 7 J. & S. 174. An unacknowledged assignment is absolutely void. *Smedley v. Smith*, 28 St. Rep. 414, 15 Daly 421, affirmed, without opinion, 126 N. Y. 637. To constitute general assignment the instrument must include all the property of the debtor and the assignee must be trustee and not absolute owner or mortgagee or pledgee of the property. *Maas v. Falk*, 54 St. Rep. 160, 24 Supp. 448, affirmed, 146 N. Y. 34. *Sherman v. Jenkins*, 70 Hun, 593. The transfer of stock of goods as security for debt to one creditor, and an assignment of the surplus to others, does not constitute a general assignment. *Boessneck v. Cohn*, 7 N. Y. Supp. 620, 26 St. Rep. 969.

The statutory requirement that the assignment shall especially state the time and place of business of the assignor is directory and not mandatory. *Dutchess Co. Mut. Ins. Co. v. Van Wagonen*, 132 N. Y. 398, 44 St. Rep. 441, affirming 18 N. Y. Supp. 256. Settling the question discussed in *Mullin v. Sisson*, 31 St. Rep. 210, 10 N. Y. Supp. 301; *Boak v. Blair*, 32 St. Rep. 911, 10 Supp. 898; *Otis v. Hodgson*, 45 St. Rep. 92, 18 Supp. 599; *Taggart v. Herrick*, 55 Hun, 569, 29 St. Rep. 424; *Strickland v. Laraway*, 9 Supp. 701; *Bloomington v. Seligman*, 3 Supp. 243. A resolution of the board of directors of a corporation authorizing its president to nominate a proper person and to execute to him an assignment of all his property does not authorize him to execute an assignment to himself. *Rogers v. Pell*, 89 Hun, 159, 35 Supp. 16, 69 St. Rep. 213. Where an assignment is not acknowledged by the assignor and assignee it is void, but does not work a dissolution of the firm so as to render a subsequent assignment invalid. *Smedley v. Smith*, 15 Daly, 421, 28 St. Rep. 421, 8 Supp. 100, affirmed, without opinion, 126 N. Y. 637. Where an assignee subscribes the assignment his assent to its terms is sufficient as required by statute. *Scott v. Mills*, 115 N. Y. 376, 26 St. Rep. 124, affirming 45 Hun, 263, 10 St. Rep. 357.

A proper acknowledgment by a corporation is an indispensable requirement to the validity of a general assignment, and cannot be supplied afterwards so as to relate back to the time of the original execution. *Matter of High Falls S. P. & M. Co.*, 20 Misc. 626, 47 Supp. 6. An acknowledgment of a general assignment must be made and certified in the same manner as deeds. *Rogers*

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v. *Pell*, 154 N. Y. 518, 40 N. E. Rep. 75, reversing 89 Hun, 159, 35 Supp. 17, 69 St. Rep. 213. Where the acknowledgment of an assignment was taken before a Master of Chancery of New Jersey, but the venue was laid in this State, *held*, that, as against the testimony of an interested witness that the acknowledgment took place in New Jersey, the venue raised a question of fact for the jury. *Rogers v. Pell*, 154 N. Y. 518, 49 N. E. Rep. 75.

The requirement in the General Assignment Act that the residence and kind of business carried on by the debtor at the time, the place where conducted, and, if in a city, the street and number, should be specifically stated, is merely directory, and a failure of the assignor to fully comply therewith will not render the assignment void. *Boak v. Blair*, 10 Supp. 898, 32 St. Rep. 911; *Taggart v. Herrick*, 55 Hun, 569, 29 St. Rep. 424, 9 Supp. 758.

Where one co-partner is authorized to execute a general assignment for the benefit of creditors, it is not necessary to set forth such authority in the certificate of acknowledgment. A defect in the certificate of acknowledgment may be cured by evidence as to what had taken place and what the acknowledgment really was. *Nat. Bank of Troy v. Scriven*, 44 St. Rep. 831.

A direction in a general assignment to pay counsel fees for service to be rendered after the transfer renders the assignment void; so held where an assignment contained a provision directing the payment of a specified sum to the assignor's attorney for counsel fees and services in preparing the assignment and preparing bonds, inventory, and schedule and legal advice connected therewith. *Norton v. Matthews*, 7 Misc. 569, 58 St. Rep. 806, 28 Supp. 265. Under § 2, requiring the assent of an assignee to be in writing at the end of or indorsed upon the assignment, the assignment is void if the assent of the assignee is by a separate writing made, acknowledged, and recorded the day after the assignment was recorded. *Noyes v. Wernberg*, 15 Abb. N. C. 164.

It is necessary that the assignee accept the trust as prescribed by the statute. *Rennie v. Bean*, 24 Hun, 123. An assignment recorded without such assent is defective, and the defect is not cured by making and recording the assent separately, even though immediately on discovering the inadvertent omission. *Schwartz v. Soutter*, 41 Hun, 323; see *Rennie v. Bean*, 24 id. 123; *Crosby v. Hillger*, 24 Wend. 280. Under the practice before the statute of 1877 it was held, in *Metcalf v. Van Brunt*, 37 Barb.

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621, that taking possession of the property would amount to an acceptance, but see the language of this act.

Under § 2, which requires the assent of the assignor subscribed and acknowledged and shall appear in writing, embraced in or at the end of or indorsed upon the assignment, before the same is recorded, and if separate from the assignment that it shall be duly recorded, an assent subscribed and acknowledged and recorded subsequently to the assignment is invalid. An assignment by indenture, sealed and acknowledged by both parties, sufficiently expresses the assent of the assignee, within the statute, for the indenture is the deed of both parties. *Scott v. Mills*, 18 Abb. N. C. 331; S. C. on appeal, 115 N. Y. 378.

A general assignment is not valid unless acknowledged. And it must be subscribed and acknowledged by the assignee before the assignment is recorded or it will be void, and with the instrument itself, and not to a separate agreement. *Noyes v. Wernberg*, 15 Abb. N. C. 164; *Brennan v. Wilson*, 4 id. 279; see 101 N. Y. 472, and 34 Hun, 511, below. The assignor and assignee must both acknowledge its execution before a competent officer. *Fairchild v. Gwynne*, 16 Abb. 23; *Hardman v. Bowen*, 39 N. Y. 196; *Britton v. Lorenz*, 45 id. 51; *Jones v. Bach*, 48 Barb. 568; *Smith v. Tim*, 14 Abb. N. C. 447; *Smith v. Boyd*, 10 Daly, 149; *Tredwell v. Sackett*, 50 Barb. 440. An attorney in fact may acknowledge. *Lowenstein v. Flaurand*, 32 N. Y. 494. And the same was held in *Baldwin v. Tynes*, 19 Abb. 32. All the resident members of a partnership making an assignment must join in the acknowledgment. *Tredwell v. Sackett*, 50 Barb. 440; *Cook v. Kelly*, 14 Abb. 466. But all need not join where one of the parties is a non-resident. *Darrow v. Bruff*, 36 How. 479. Or has absconded. *Nat. Bank v. Sackett*, 2 Abb. (N. S.) 286; *Welles v. Marsh*, 30 N. Y. 344. The assignee, however, cannot question the validity of the assignment for want of an acknowledgment. *Randall v. Dusenberry*, 39 N. Y. Super. Ct. 174. And a mere clerical error in the acknowledgment will not vitiate it. *Claffin v. Smith*, 15 Abb. N. C. 241. The validity of an assignment cannot be attacked collaterally on the ground it was not acknowledged before delivery. *Randall v. Dusenberry*, 39 N. Y. Super Ct. 174, affirmed, without opinion, 63 N. Y. 645.

An assignment for the benefit of creditors, recorded without the assent of the assignee having been subscribed and acknowl-

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edged, although he may have orally agreed to act, is void against creditors claiming under an attachment against the assignor's property. *Rennic v. Bean*, 24 Hun, 123. A defective acknowledgment is an irregularity that cannot be cured so as to give the assignee title over attaching creditors. *Smith v. Boyd*, 10 Daly, 149. This case is reversed, 101 N. Y. 472, and it is held that where on the same paper, and following the signatures to an assignment, was written a notary's certificate of acknowledgment, bearing the same date as the assignment, and naming as the persons acknowledging, the ones who apparently executed the assignment, and stating that the persons were to the notary "known to be the individuals described in and who executed the same;" that the words "the same" referred to the instrument to which the certificate was appended, and sufficiently identified the same, and that the certificate showed a due acknowledgment of the instrument. An assignment is not invalidated by reason of a clerical error in the certificate of acknowledgment. *Clafin v. Smith*, 15 Abb. N. C. 241; see, *contra*, *Smith v. Tim*, 14 Abb. N. C. 447. Where a proper certificate of acknowledgment was added after record, and a new record made, it was held that the assignment took effect as of date of record. *Camp v. Buxton*, 34 Hun, 511.

It is necessary that the assignment be recorded in order to pass title. *McBlain v. Spellman*, 6 Civ. Pro. 403; *Simon v. Kaliske*, 6 Abb. (N. S.) 224; *Rennic v. Bean*, 24 Hun, 123; *Smith v. Boyd*, 18 Week. Dig. 461. But the omission to record the assignment is no evidence of fraudulent intent on the part of the assignor. *Denger v. Mundy*, 5 Robb, 636. When a non-resident assigns, the assignment should be recorded where the real estate of the assignor is situated. *Scott v. Guthrie*, 25 How. 481. The delivery of the assignment for record is *prima facie* a delivery to the assignee. *Fryer v. Rockfeller*, 63 N. Y. 268. Title to the property passes on the delivery of the assignment, and subsequent requirements of the statutes, such as recording, are directory. *Warner v. Jaffray*, 96 N. Y. 248; *McBlain v. Spellman*, 35 Hun, 263; *Nicoll v. Spowers*, 6 St. Rep. 457.

Precedent for Assignment.

This indenture made this third day of July, in the year one thousand eight hundred and eighty-five, by and between Rudolph

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Aikens, of the town and county of Ulster, State of New York, party of the first part, and James H. Everett, residing at No. 210 Broadway, the city of Kingston, said county, of the second part, witnesseth that, whereas the party of the first part is indebted to divers persons in sundry sums of money which he is unable to pay in full, and is desirous of providing for the payment of the same so far as in his power by an assignment of all his property for that purpose :

Now, therefore, the said party of the first part, in consideration of the premises, and of the sum of one dollar, to him paid by the party of the second part upon the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred, and set over, and by these presents does grant, bargain, sell, assign, transfer, and set over unto the said party of the second part, his heirs, executors, administrators, and assigns, all and singular the lands, tenements, hereditaments, and appurtenances, and goods, chattels, stock, promissory notes, debts, claims, demands, property, and effects of every description belonging to the party of the first part, wherever the same may be, except such property as is exempt by law from levy and sale under execution, to have and to hold the same, and every part thereof, unto the said party of the second part, his heirs, executors, administrators, and assigns. In trust, nevertheless, to take possession of the same, and to sell the same with all reasonable despatch, and to convert the same into money, and also to collect all such debts and demands hereby assigned as may be collectible, and with and out of the proceeds of such sales and collection,

First. To pay and discharge the just and reasonable expenses, costs, and charges of executing this assignment, and of carrying into effect the trust hereby created, together with a lawful commission to the party of the second part for his services in executing said trust, and also to make payments required by chapter 328 of Laws of 1884, as amended by chapter 283, Laws of 1886.

Second. To pay to Caroline F. Smith, of Vineland, New Jersey, widow of Benjamin Smith, deceased, in full for a certain promissory note made by me and Margaret D. Smith, and held by said Caroline in the sum of \$2,000, and all unpaid interest thereon. If the residue of said proceeds shall be sufficient for that purpose, and if the same be not sufficient, then the said party of the second part shall apply the said residue toward the payment of said note.

Third. After the payment of the note mentioned in the previous preference in full, the said party of the second part shall pay the following parties in full for the following notes held by them respectively :

To the National Bank of Newburgh, note of Cornelius C. Smith, indorsed by Peck, Van Dalfsen & Co., due July 27, 1885		\$1,500
Note of Cornelius C. Smith, indorsed by D. H. Selleg, due July 25, 1885		2,121
To Peck, Van Dalfsen & Co., of Newburgh, note of Cornelius C. Smith, indorsed by Peck, Van Dalfsen & Co., due June 27, 1885		2,500

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To Quassaick National Bank, of Newburgh, note of Cornelius C. Smith, indorsed by Peck, Van Dalfsen & Co., due September 5, 1885.....	\$ 600
To Charles A. Harcourt, of Newburgh, note of Cornelius C. Smith, of date February 11, 1882, and arrearages of interest.....	1,000

If the residue of said proceeds shall be sufficient for that purpose, and if the same be not sufficient, then the said party of the second part shall apply the residue of said proceeds to and for the payment of the said notes mentioned in this preference, ratably and in proportion to the respective amounts thereof.

Fourth. And after fully paying and discharging all the aforesaid debts as before provided, the said party of the second part shall pay all and singular all other debts and liabilities of the party of the first part : and if such residue be not sufficient to pay and discharge all such debts and liabilities in full, then the said party of the second part shall apply the residue of said proceeds to and in payment of such debts and liabilities, ratably and in proportion to the respective amounts thereof.

Fifth. And if after the payment of all the said debts and liabilities in full, there shall be any remainder or residue of said property or proceeds, to repay and return the same to the said party of the first part, his executors, administrators, and assigns. And in furtherance of the premises, the said party of the first part does hereby make, constitute, and appoint the said party of the second part his true and lawful attorney irrevocable, with full power to do all acts and things which may be necessary in the premises to the full execution of the trust hereby created ; and to ask, demand, recover, and receive of, and from all and every person or persons, all property debts, demands due, owing and belonging to the said party of the first part, and hereby transferred, and to give acquittances and discharges for the same, to sue, prosecute, defend, and implead for the same, and to execute, acknowledge, and deliver all necessary deeds, instruments, and conveyances.

And the party of the first part does hereby authorize the said party of the second part to sign the name of the said party of the first part to any check, draft, promissory note, or other instrument in writing, which is payable to the order of the said party of the first part, or to sign the name of the party of the first part to any instrument in writing, whenever it shall be necessary so to do to carry into effect the object, design, and purpose of this trust.

The said party of the second part doth hereby accept the trust created and reposed in him by this instrument, and covenants and agrees to and with the said party of the first part, that he will faithfully, and without delay, execute the trust hereby created according to the best of his skill, knowledge, and ability.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

(Signatures of assignor and assignee.)

Sealed and delivered in presence of

(Add acknowledgment.)

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Precedent for Partnership Assignment.

Know all men by these presents, that we, Foster T. Dunwoody, Charles O. Dunwoody, and William O. Vedder, heretofore carrying on business under the name and style of Dunwoody Brothers & Vedder, at Kingston, Ulster County, New York, being justly indebted to sundry persons in divers sums of money, which we are unable to pay in full, and being desirous of providing for their payment by assigning all our property ; for that purpose we, as a co-partnership and individually, in consideration of one dollar to us in hand paid by James H. Everett, of the same place, the receipt whereof is hereby acknowledged, and of the uses, trusts, and purposes hereinafter mentioned, have granted, sold, assigned, transferred, and set over and by these presents do grant, self assign, transfer and set over unto the said James H. Everett, his heirs, executors, administrators, and assigns, all the lands, tenements, and hereditaments, goods, chattels, and effects, and all accounts, debts, and demands due or belonging to us, both as co-partners and as individuals, together with all securities for the same, to have and to hold the same with all the appurtenances unto the said James H. Everett, his heirs, executors, administrators, and assigns, in trust nevertheless. The said James H. Everett shall forthwith take possession of the property and premises of the said firm of Dunwoody Brothers & Vedder, and of the individual members thereof hereby assigned, and with all reasonable diligence, sell and dispose of the same by public or private sale for the best price that can be obtained, and convert the same into money, and also to collect all such debts, accounts, or demands as may be collectible, and with and out of the proceeds of such sales and collections shall :

First. Pay and discharge all the just and reasonable expenses, costs, and charges of executing this assignment and of carrying into effect the trust hereby created, together with lawful commissions to the party of the second part for his services in executing said trust.

Second. To pay out of the partnership funds and assets next after said costs and expenses chargeable thereto, four notes indorsed by the said firm of Dunwoody Brothers & Vedder, and held and owned by the Kingston National Bank for \$500 each, two of which are dated December 15, 1883, one being made by Foster T. Dunwoody, the other by Charles O. Dunwoody ; two of which are dated March 9, 1884, one of which is made by Foster T. Dunwoody, and one by Charles O. Dunwoody, all payable to the order of Delia C. Vedder. In case said assets are insufficient to pay in full, the same to be applied ratably.

Third. After the payment of said four notes in full, to pay out of said partnership funds and assets the sum of \$1,000, with interest thereon due and owing from said firm to George W. Vedder, of Rhinebeck, N. Y., for moneys loaned it, also the sum of \$500 due Delia C. Vedder from said firm, for moneys loaned and advanced it. In case the firm assets are insufficient to pay said debts in full, then the same to be paid ratably, in proportion to their respective amounts.

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Fourth. After such payments next to pay out of the partnership assets the sum of \$519, due Everett & Treadwell for merchandise sold the firm of Dunwoody Brothers & Vedder.

Fifth. After the said payment in full of all said debts hereinbefore set forth, to apply the remaining proceeds of the partnership property in payment of the remaining partnership debts, and in case the proceeds are insufficient to pay the same, to distribute such proceeds ratably among said remaining creditors, in proportion to their respective claims.

Sixth. In case there is any surplus after paying firm debts in full, then to apply the same in payment of the individual debts of each of said members of the firm, in case any remain unpaid, out of their individual assets, paying to the creditors of each member the proportion to which each member would be entitled.

Seventh. Out of the net proceeds of the individual property of Foster T. Dunwoody to first pay Delia C. Vedder the sum of \$320, due her on account of board of said Foster T. Dunwoody.

Eighth. After paying said sum of \$320 to Delia C. Vedder, next to pay out of said proceeds of his individual property the two notes made by said Foster T. Dunwoody and held by the Kingston National Bank, for \$500 each, mentioned and fully described in the second clause of this instrument, and indorsed by said Delia C. Vedder and the said firm.

Ninth. Next after such notes, to pay out of said individual assets of said Foster T. Dunwoody any individual indebtedness of said Foster T. Dunwoody, or apply the proceeds ratably thereon, first paying in full the note held by George W. Vedder, in case he has individually indorsed the same.

Tenth. Next after said individual indebtedness, to apply the proceeds of such individual assets of said Foster T. Dunwoody to the payment of the claim of Delia C. Vedder of \$500 against the said firm, for moneys loaned, and the said note of George W. Vedder for \$1,000, for money loaned, in case the said Foster has not indorsed said note individually, and in case the same is insufficient to pay in full, then ratably.

Eleventh. To apply next thereafter said individual property of said Foster T. Dunwoody to the payment of indebtedness heretofore set forth, of \$519 to Everett & Treadwell, or as much as shall remain unpaid.

Twelfth. After said payments as aforesaid, in full, to apply the balance of such individual assets of Foster T. Dunwoody *pro rata* to the payment of the firm debts, in case any remain unpaid, out of the firm assets.

Thirteenth. Out of the net proceeds of the individual property and assets of Charles O. Dunwoody, to first pay Delia C. Vedder the sum of \$240, due her on account of board.

Fourteenth. Next after such payment to Delia C. Vedder, to pay out of said individual property of Charles O. Dunwoody two notes made by him, held by the Kingston National Bank, for \$500 each, heretofore described in clause second of this instrument, and indorsed by said Delia C. Vedder and said firm.

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Fifteenth. Next after such notes, to pay out of said individual assets of said Charles O. Dunwoody any individual indebtedness by said Charles O. Dunwoody, or apply the proceeds ratably thereon, first paying in full the note held by George W. Vedder, in case he has individually indorsed the same.

Sixteenth. Next after said individual indebtedness, to apply the proceeds of such individual assets of said Charles O. Dunwoody to the payment of the claim of Delia C. Vedder of \$500 against the said firm, for moneys loaned, and the said note of George W. Vedder for \$1,000, for moneys loaned ; in case the same is insufficient to pay in full, then ratably.

Seventeenth. To apply next thereafter said individual property of said Charles O. Dunwoody to the payment of indebtedness heretofore set forth of \$519 to Everett & Treadwell, or so much as shall remain unpaid.

Eighteenth. After said payments as aforesaid in full, to apply the balance of such individual assets of Charles O. Dunwoody *pro rata* to the payment of the firm debts in case any remain unpaid out of the firm assets.

Nineteenth. Out of net proceeds of the individual property of William O. Vedder to first pay George W. Vedder the \$1,000 due him on note now a debt of the firm, or apply it thereon.

Twentieth. To pay out of the individual property of William O. Vedder next thereafter any individual debts of said William O. Vedder, or apply it ratably.

Twenty-first. If there remain any surplus out of said individual property of William O. Vedder, to apply it ratably on the firm debts for which he is liable.

Twenty-second. And if, after the payment of all the said debts and liabilities in full, there shall be any remainder or residue of said property or proceeds, to repay and return the same to the said parties of the first part, their executors, administrators, and assigns.

And in furtherance of the premises the said parties of the first part do hereby make, constitute, and appoint the said party of the second part our true and lawful attorney irrevocable, with full power and authority to do all acts and things which may be necessary in the premises to the full execution of the trust hereby created, and to ask, demand, recover, and receive of and from all and every person or persons all property, debts, demands due, owing, and belonging to the said party of the second part, and to give acquittance and discharges for the same, to sue, prosecute, defend, and implead for the same, and to execute, acknowledge, and deliver all necessary deeds, instruments, and conveyances.

In witness whereof the parties to these presents have hereunto set their hands and seals the 14th day of March, A. D. 1886.

FOSTER T. DUNWOODY. [L. s.]

CHARLES O. DUNWOODY. [L. s.]

WILLIAM O. VEDDER. [L. s.]

DUNWOODY BROTHERS & VEDDER. [L. s.]

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Sealed and delivered in }
 the presence of }

H. E. McKENZIE.

I hereby accept the trust created by the above instrument and covenant faithfully to perform the same.

JAMES H. EVERETT.

Dated March 14, 1886.

(Add acknowledgment.)

SUB. 3. VALIDITY AND EFFECT OF ASSIGNMENT.

Any reservation or condition as to the assignor's property will be fatal to the assignment. *Grover v. Wakeman*, 11 Wend. 189; *Burdick v. Post*, 12 Barb. 168; *Brigham v. Tillinghast*, 13 N. Y. 215. The trustees should be given the unreserved power to convert the estate into money, and apply it to payment of debts. *Kerchcis v. Schloss*, 49 How. 284; *Riggs v. Murray*, 2 Johns. Ch. 565; *Haydock v. Coope*, 53 N. Y. 68; *Litchfield v. White*, 3 Sandf. 545. The assignee will be bound by restrictions, and they will, if not proper, be fatal to the assignment. *Dunham v. Watermann*, 17 N. Y. 9; *Ogden v. Peters*, 21 id. 23; *Jes-sup v. Hulse*, id. 168; *Keteltas v. Wilson*, 36 Barb. 298. The power to sell the assignor's property and apply to payment of his debts is all that is necessary. *Planck v. Schermerhorn*, 3 Barb. Ch. 644. Unless preferences are sought to be given. *Frazer v. Truax*, 27 Hun, 587. A provision for payment of expenses of the trust is, however, usual and proper; but at not more than the rate allowed by law. *Keteltas v. Wilson*, 36 Barb. 298; *Jacobs v. Remsen*, 36 N. Y. 668; *Barney v. Griffin*, 2 id. 365. Power to compound debts due the assignor is a proper provision. *Dow v. Platner*, 16 N. Y. 562; *Brigham v. Tillinghast*, 15 Barb. 618; *Bel- lows v. Partridge*, 19 id. 176; see *McConnell v. Sherwood*, 94 N. Y. 522. And so of power to pay taxes, rent, and insurance. *Morrison v. Atwell*, 9 Bosw. 503; *Van Dine v. Willett*, 38 Barb. 319; *Whitney v. Krows*, 11 id. 198. So the assignee may be authorized to employ attorneys and agent. *Jacobs v. Remsen*, 36 N. Y. 668; *Casey v. Jones*, 37 id. 608; *Van Dine v. Willett*, *supra*.

The law has, however, fixed the compensation to the assignee, and it cannot be increased by the assignor to the prejudice of creditors. The attempt to do so would vitiate the assignment. If the assignee is entitled to any further sum by way of compen-

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sation, he must look to the assignor. *Bagler v. Eppley*, 2 St. Rep. 101, citing *Matter of Hurlburt*, 89 N. Y. 259, and cases *supra*.

The following are some of the cases holding certain specific provisions inserted in general assignments do not affect their validity: *Mann v. Whitbeck*, 17 Barb. 388; *Hitchcock v. Cadmus*, 2 id. 381; *Halstead v. Gordon*, 34 id. 422; *Whitney v. Krowes*, 11 id. 198; *Stern v. Fisher*, 32 id. 198; *Townsend v. Stearns*, 32 N. Y. 209; *Jessup v. Hulse*, 21 id. 168; *Butt v. Peck*, 7 Daly, 83; *Campbell v. Woodworth*, 34 Barb. 425; *Jacobs v. Remsen*, 36 N. Y. 668; *Nichols v. McEwen*, 21 Barb. 65; *Clark v. Fuller*, id. 128; *Kellogg v. Slauson*, 11 N. Y. 302; *Ogden v. Peters*, 21 id. 23; *Griffith v. Marquardt*, id. 131; *Van Rossum v. Walker*, 11 Barb. 237; *Grant v. Chapman*, 38 N. Y. 293; *Carpenter v. Underwood*, 19 id. 520; *Spaulding v. Strang*, 36 Barb. 135; *Low v. Graydon*, 50 id. 414; *Powers v. Graydon*, 10 Bosw. 630; *Dow v. Platner*, 16 N. Y. 562; *McConnell v. Sherwood*, 84 id. 522; *Coyne v. Weaver*, id. 386; *Hastings v. Belknap*, 1 Den. 190; *Bellows v. Partridge*, 19 Barb. 176; *Ward v. Tingley*, 4 Sandf. Ch. 476. The courts are said to lean to a construction favorable to an assignment for the benefit of creditors, and will, if possible, so interpret it as to render it legal and operative. *Grover v. Wakeman*, 11 Wend. 187; *Read v. Worthington*, 9 Bosw. 617; *Benedict v. Huntington*, 32 N. Y. 219; *Bogart v. Haight*, 9 Paige, 297; *Mann v. Whitbeck*, 17 Barb. 388; *Sherman v. Elder*, 24 N. Y. 381; *Kellogg v. Slauson*, 11 id. 302; *Platt v. Lott*, 17 id. 478; *Brainard v. Dunning*, 30 id. 211; *Townsend v. Stearns*, 32 id. 209.

A very large number of decisions have been made as to what vitiates an assignment, giving the different grounds, and no attempt will be made to give more than a general statement, with but a portion of the numerous citations. A reservation by the assignor to himself of any benefit out of or from the assignment before payment of debts in full will invalidate the assignment. *Mackie v. Cairns*, 5 Cow. 549; *Elias v. Farley*, 3 Keyes, 398; *Berry v. Riley*, 2 Barb. 307; *Jackson v. Parker*, 9 Cow. 73; *Mead v. Phillips*, 1 Sandf. Ch. 83; *Grover v. Wakeman*, 11 Wend. 187; *Goodwich v. Down*, 6 Hill, 438; *Lentillon v. Moffat*, 1 Edw. 451; *Hyslop v. Clarke*, 14 Johns. 458; *Nicholson v. Leavitt*, 4 Sandf. 252; *Strong v. Skinner*, 4 Barb. 546; *Doremus v. Lewis*, 8 id. 124; *McClelland v. Remsen*, 36 id. 622; *Barney v. Griffin*, 2 N. Y. 365; *Leitch v. Hollister*, 4 id. 211; *Collomb v. Caldwell*, 16 id.

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484; *Haydock v. Coope*, 53 id. 68. So will the creation of a trust for the benefit of the assignor. *Collomb v. Caldwell*, 16 N. Y. 484; *Wilson v. Robertson*, 21 id. 587. Or a condition that the creditors must release their entire claims on receiving payment in part. *Armstrong v. Byrne*, 1 Edw. Ch. 79; *Smith v. Woodruff*, 1 Hilt. 462; *Mills v. Ledy*, 2 Edw. Ch. 183; *Hyslop v. Clarke*, 14 Johns. 458; *Powers v. Graydon*, 10 Bosw. 630; *Wakeman v. Grover*, 4 Paige, 23; *Woodburn v. Mosher*, 9 Barb. 255; *Hastings v. Belknap*, 1 Den. 190; *Spaulding v. Strang*, 36 Barb. 310. Nor can the assignor authorize the assignee to sell on credit. *D'Ivernois v. Leavitt*, 23 Barb. 63; *Morrison v. Brand*, 5 Daly, 40; *Whitney v. Kroes*, 11 Barb. 198; *Burdick v. Post*, 6 N. Y. 522; *Nicholson v. Leavitt*, id. 510; *Barney v. Griffin*, 2 id. 365; *Porter v. Williams*, 9 id. 142; *Rapalce v. Stewart*, 27 id. 310; *Wilson v. Robertson*, 21 id. 587. Or give power to the assignor to give further preferences. *Grover v. Wakeman*, 4 Paige, 24; *Sheldon v. Dodge*, 4 Den. 217; *Hyslop v. Clarke*, 14 Johns. 458; *Averill v. Loucks*, 6 Barb. 470; *Barnum v. Hempstead*, 7 Paige, 571; *Strong v. Skinner*, 4 Barb. 546; *Kercheis v. Schloss*, 49 How. 284; *Boardman v. Halliday*, 10 Paige, 223; *Frazier v. Truax*, 27 Hun, 587. The assignor cannot exempt the assignee from any liability which he would be subjected to by law. *Litchfield v. White*, 7 N. Y. 478; *Metcalf v. Van Brunt*, 37 Barb. 621; *Van Nest v. Yoe*, 1 Sandf. Ch. 4; *Jacobs v. Allen*, 18 Barb. 495. But this does not relate to a provision exempting him from liability for uncollectible debts. *Cassey v. Janes*, 37 N. Y. 608.

The assignee cannot be authorized to mortgage or lease the assigned property, but it seems only that provision, and not the entire assignment, will be void. *Darling v. Rogers*, 22 Wend. 483; *Van Nest v. Yoe*, 1 Sandf. Ch. 4; *Planck v. Schermerhorn*, 3 Barb. Ch. 644. A provision authorizing the assignee to continue the assignor's business invalidates the assignment. *Dunham v. Waterman*, 17 N. Y. 9; *Schlussel v. Willett*, 34 Barb. 615; *Watson v. Brown*, 15 Abb. N. C. 412; *Benton v. Kelly*, 49 Barb. 536. But in the late case of *Robbins v. Butcher*, decided March 1, 1887 (25 Week. Dig. 562), it is held that a provision in an assignment for creditors, empowering the assignee, if necessary, to finish unfinished work and pay expenses thereof, prior to payment of debts, does not invalidate the assignment. Such authority is subject to the approval of the courts, and the assignee is

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subject to their prohibition. A provision regulating the sale of property and collection of assets renders assignment void. *Brigham v. Tillinghast*, 13 N. Y. 215; *Woodburn v. Mosher*, 9 Barb. 255; *Murphy v. Bell*, 8 How. 468; *Rapalce v. Stewart*, 27 N. Y. 310; *D'Ivernois v. Leavitt*, 23 Barb. 63. But as to this, see construction of language used in *Ogden v. Peters*, 21 N. Y. 121; *Jessup v. Hulsc*, id. 168; *Townsend v. Stearns*, 32 id. 209; *Clapp v. Utley*, 16 How. 384; *Bellows v. Partridge*, 19 Barb. 176; *Wilson v. Robertson*, 21 N. Y. 587. A provision authorizing the assignor to assume future liabilities for the assignee renders the assignment void. *Lansing v. Wadsworth*, 1 Sandf. Ch. 43; *Barnum v. Hempstead*, 7 Paige, 568; *Carrie v. Hart*, 2 Sandf. Ch. 353; *Elias v. Farley*, 3 Keyes, 398; *Brainard v. Dunning*, 30 N. Y. 211; *Sheldon v. Dodge*, 4 Den. 217. But this does not apply to a provision for debts incurred but not yet due, even if contingent. *Griffin v. Marquardt*, 21 N. Y. 121; *Keteltas v. Wilson*, 36 Barb. 298; *Cunningham v. Freeborn*, 11 Wend. 241; *Bank of Silver Creek v. Talcott*, 22 Barb. 550; *Brainard v. Dunning*, 30 N. Y. 211.

A provision in an assignment which must necessarily have the effect to hinder, delay, or defraud creditors, is conclusive evidence of fraudulent intent, and vitiates the assignment. *Coleman v. Burr*, 93 N. Y. 31. A schedule, made on an assignment for benefit of creditors, may be referred to and considered a portion of it, for the purpose of ascertaining the existence of an intent, to defraud creditors, by including in the schedule a debt that has been paid, and such act renders the assignment void as to other creditors. *Talcott v. Hess*, 31 Hun, 282. A provision authorizing the assignee, in his discretion, to sell or dispose of the assets for such consideration in money or other thing as the assignee may deem sufficient, held, an evidence of fraudulent intent on the assignor's part, rendering such assignment void. *Bagley v. Bowe*, 50 N. Y. Super. Ct. 100. An assignment by a partnership is invalidated by a preference of an individual creditor of one of the partners. *Windmuller v. Dodge*, 67 How. 253. But preferring firm debts out of partnership property does not invalidate. *Becker v. Leonard*, 3 St. Rep. 765. A provision for payment of co-partnership debts out of individual property is not a fraud on the individual creditors. *Haynes v. Brooks*, 8 Civ. Pro. 10. (It seems the individual creditors made no objection.) The

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individual assets of members of a firm were directed to be applied equally to payment of their individual debts, which were unequal, as were their individual assets; *held*, the assignment was fraudulent and void. *Crook v. Rindskop*, 34 Hun, 457.

As the creditors of a firm are also the creditors of the individual members of the firm, one partner cannot be permitted to diminish the assets to the prejudice not only of those who are creditors of the firm, but also of each individual member, and the right of the firm's creditors to its property cannot be impaired by any consideration of the interests of an individual partner, and an assignment which defeats that right, or hinders or delays the creditor in enforcing it, is a violation of the statute, and a fraud upon such creditors. *Peckham v. Mattison*, 15 Abb. N. C. 367. It is further held in that case that the rule which avoids an assignment by a firm, which prefers the debts of a partner, does not apply where it prefers debts of a firm composed of a portion of the members of the firm assigning, and such an assignment is not fraudulent. Where a factor who had not guaranteed payment for goods sold preferred consignors for full amount sold, although not all collected, it was held not to be fraudulent. *Whiting v. Lebenheim*, 14 Week. Dig. 415.

An assignment for the benefit of creditors, reciting that the assignors are a firm and transferring "our" property for the benefit of "our" creditors, and not referring to assets or debts as individual, is a transfer of firm property only to pay firm debts and not void as providing for the payment of firm debts with individual assets. *Matter of Davis*, 1 How. (N. S.) 79. An assignment by partners of their firm and individual property to pay all their firm debts is not fraudulent on its face, although it fails to make any provision as to the order in which the debts shall be paid, since the assignee is bound by law to make a proper and legal distribution of the assets, that is, out of the firm property to first pay firm debts, and out of the individual property to first pay individual debts. *Friend v. Michaelis*, 15 Abb. N. C. 354. The fact that the assignor, at the assignee's request, promised in advance to aid him in the care and sale of the goods does not establish a fraudulent intention, nor is an assignment void merely because the assignor, previous to the assignment, stated to the assignee that he expected, or had reason to believe, that the assignment would prove temporary only; nor is fraud shown

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by the assignor and his employes remaining in the employ of assignor. *North River Bank v. Schumann*, 63 How. 476. A county judge has no power to set aside a general assignment upon the ground that it was procured by the undue influence of the assignee, or was made with intent to hinder or defraud the assignor's creditor. *Matter of Thompson*, 30 Hun, 195. It is further held in the last case cited, that in no event can an assignment be set aside by a general creditor who has not procured a judgment, and to this point is cited *Southard v. Benner*, 72 N. Y. 274, and *Spring v. Short*, 90 id. 538; see, also, *Crouse v. Frothingham*, 97 id. 105. An assignment of personal property in this State, signed and acknowledged out of the State by a non-resident doing business here, and delivered to the assignee here, and accepted by him in an instrument executed here, is deemed executed in this State and must be construed according to our laws. *Grady v. Bowe*, 16 Week. Dig. 136. Defendant resided in New Jersey and made an assignment with preferences in this State, which is forbidden by the laws of that State. Both owned personal property in New Jersey not mentioned in the inventory. *Held*, that it was not fraudulent, as such personal property was not property which the assignee was entitled to recover, and that withholding it from the assignee would not invalidate the assignment as it would were the property in the State of New York. *Eastern National Bank v. Hulshizer*, 2 St. Rep. 93. Power to complete certain unfinished work, if beneficial to the trust, in the discretion of the assignee does not avoid the assignment. *Watson v. Butcher*, 37 Hun, 391; *Robbins v. Butcher*, 25 Week. Dig. 562. The deposit of the assignment with a stranger after complete execution, to hold until the receipt of further orders from the assignor, or to file when in the judgment of the depository it shall be for the best interest of all the creditors, amounts to a reservation of power to revoke by the assignor and renders the assignment void. *Reichenback v. Winkbous*, 67 How. 513. The withholding for their own use for any considerable part of an estate from the operation of a general assignment is a fraud on the part of the assignors which will invalidate the assignment as against their creditors. *Iselin v. Henlein*, 16 Abb. N. C. 73. In note to Abbott's Digest, 1885, it is stated that the principle recognized in *Schultz v. Hoagland*, 85 N. Y. 464, that the assignor's intentional omission from the schedules, of property which should

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have been devoted to payment of their debts, raises an inference of fraud, was applied in *Valentine v. Sulzbacker*, Superior Court, 1884, and that the rule in *Talcott v. Hess*, 31 Hun, 282, and in *Milliken v. Dart*, 26 id. 24, that preferences for fictitious indebtedness shows an intent to defraud, was applied in *Muser v. Alexander*, Supreme Court, 1884, both of which cases were reported in Daily Register. The debtor who makes a general assignment must devote all his property to the payment of his debts except such as is exempt by law. Any device to cover up the property for the benefit, of the assignor, or to secure to him, directly or indirectly, any benefit, is fraudulent. *White v. Fagan*, 18 Week. Dig. 358. To entitle a creditor to set aside an assignment on the ground of fraud, a creditor need not show that the assignee was a party to the fraud. *Talcott v. Hess*, 31 Hun, 282. Suspicion of fraud on the part of the assignor is not sufficient to warrant vacating a general assignment. *Eastern Nat'l Bank v. Hulshizer*, 2 St. Rep. 93. It does not invalidate an assignment to make it to a person named "his successors and assigns," the word "assigns" is not entitled to a construction which is legal. *Hess v. Blakesley*, 2 St. Rep. 309; *Flagler v. Schoeffel*, 40 Hun, 178. The withholding of a sum of money from the assignee is such a fraud. An intentional omission of valuable property belonging to the assignor from the schedule of assets is sufficient evidence of fraudulent intent to vitiate the assignment. *Bagley v. Bowe*, 50 N. Y. Super. Ct. 100; *White v. Fagan*, *supra*. Creditors defrauded by an assignment have a right to waive the fraud, accept the assignment, and come in under it, and if all defrauded have done so the court must enforce the trust upon the application of any one having a valid debt against the assignors. *Matter of Davis*, 1 How. (N. S.) 79. Where creditors having full means of knowing all the facts so acted with reference to the trust as to have ratified it, they cannot maintain an action to set it aside as fraudulent. *Cavanaugh v. Morrow*, 67 How. 241. An action to set aside an assignment cannot be maintained after the fund has been distributed and the assignee discharged. The decree of the county judge has the force and validity of a judgment and protects the assignee. *McLean v. Prentice*, 34 Hun, 504. When the other portions of a general assignment show that a clause directing the "assignors to take possession," etc., of the assigned property is a clerical

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error, such clause will not vitiate the assignment. It is not necessary to reform the instrument, effect will be given to its apparent meaning without reformation. *Smith v. Bellows*, 3 St. Rep. 305. A creditor cannot assail the validity of an assignment in county court under the provisions of the General Assignment Act. He must resort to those actions and remedies which the law provides. *Matter of Holbrook*, 99 N. Y. 539. The question of whether in making an assignment a fraudulent intent existed is a question for the jury. *Rose v. Meldrum*, 11 Week. Dig. 354. Where an assignment appears to have been made with intent to hinder, delay, or defraud creditors, it affords no protection to an assignee against a sheriff who seeks to enforce by execution a judgment against the debtor. *McConnell v. Sherwood*, 61 How. 67, 84 N. Y. 522. In *Smith v. Longmire*, 12 Week. Dig. 88, the rule that choses of a debtor in the hands of his assignee under a general assignment cannot be attached so as to establish an enforceable lien is reiterated and applied. To render a general assignment void because not executed by all the members of a partnership, it must appear that those who did not sign are partners, not as to third persons but between themselves. *Adce v. Cornell*, 25 Hun, 78. The omission from the schedules, or the failure to deliver to the assignee a worthless demand, cannot serve as a basis for an inference of fraud. If utterly worthless it may be treated as if it never existed. *Schultz v. Hoagland*, 85 N. Y. 64; *Hoyt v. Godfrey*, 88 id. 669.

Authorizing sale on credit invalidates the assignment, and cannot be cured by new instrument. *Barney v. Griffin*, 2 N. Y. 365; *Nicholson v. Leavitt*, 6 id. 610; *Kellogg v. Slauson*, 11 id. 302; *Porter v. Williamson*, 9 id. 142; *Townsend v. Stearns*, 32 id. 109. So does authority to convert into cash, or otherwise dispose of to the best advantage, or to convert into money or available means. *Rapalee v. Stewart*, 27 N. Y. 310; *Brigham v. Tillinghast*, 13 id. 215; and provision that the assignee shall not be liable for loss except for gross negligence or wilful misfeasance. *Litchfield v. White*, 7 N. Y. 438. But authority to convert into money within such convenient time as to him may seem meet at public or private sale, or to sell in such manner as seems to the assignee most for the benefit of creditors, does not avoid. *Townsend v. Stearns*, 32 N. Y. 109; *Benedict v. Huntington*, id. 219. Assignment by firm is presumptively void for preferring individual

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to firm creditors. *Hulbert v. Dean*, 2 Keyes, 97; *Wilson v. Robertson*, 21 N. Y. 587. A general assignment carries with it all the debtor's property, whether mentioned in the schedules or not. *Platt v. Lott*, 17 N. Y. 478; *Turner v. Jaycox*, 70 id. 470; *Schultz v. Hoagland*, 85 id. 464. A general assignment with preferences is valid if free from fraud. *Hauselt v. Vilmar*, 76 N. Y. 630. But a preference with a view to benefit assignor avoids assignment. *Elias v. Farley*, 3 Keyes, 398. A provision for working up the stock avoids the assignment. *Dunham v. Waterman*, 17 N. Y. 9; *Matter of Dean*, 86 id. 398; but see *Robbins v. Butcher*, 25 Week. Dig. 562, *supra*. As does also a provision for a counsel fee to an assignee who is a lawyer. *Nicholas v. McEwan*, 17 N. Y. 22. A provision that the assignee shall not be liable for uncollectible debts, however, does not avoid assignment. *Casey v. Janes*, 37 N. Y. 608. An assignment is not avoided by giving priority of payment to a usurious judgment. *Murray v. Judson*, 9 N. Y. 73; *Chapin v. Thompson*, 89 id. 270. Nor by assignee's declarations subsequent to assignment. *Cuyler v. McCartney*, 40 N. Y. 221. Unless he remains in possession. *Adams v. Davidson*, 10 N. Y. 309. But assignor remaining in possession of the assigned property is only presumptive evidence of fraud. *Ball v. Loomis*, 29 N. Y. 412. An assignee may sue to set aside a fraudulent conveyance made by assignor. *McMahon v. Allen*, 35 N. Y. 403. This is authorized by statute. Laws of 1858, chap. 314. But judgment creditors who obtained judgment after the assignment cannot attack such a conveyance, as they have no lien. *Spring v. Short*, 90 N. Y. 540; *Crouse v. Frothingham*, 97 id. 112; *Lowery v. Clinton*, 32 Hun, 268. The fund must, when an action is thus brought by the assignee, be distributed to all the creditors. *Crouse v. Frothingham*, 97 N. Y. 112. Simple contract creditors have no standing to set aside an assignment, nor has a receiver appointed in supplementary proceedings, except so far as it shall be necessary to satisfy his debt and costs. *Reubens v. Joel*, 13 N. Y. 488; *Kennedy v. Thorp*, 51 id. 174; *Bostwick v. Menck*, 40 id. 383. And the assignee can only be compelled to account for benefit of all the creditors. *Schuehle v. Reiman*, 86 N. Y. 270. A member of a firm may appropriate his individual property to the payment of the firm debts, and where the firm has made an assignment, a conveyance by an individual member of the firm to the assignee to pay firm debts is not un-

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lawful or void, only the creditors of the individual can attack it. *Royer Wheel Co. v. Fielding*, 101 N. Y. 504. An assignee for the benefit of creditors may attack a chattel mortgage executed by his assignor as fraudulent, and void as to creditors. *Ball v. Slaften*, 98 N. Y. 622.

A provision authorizing the assignee to compromise with creditors of the assignor renders it invalid. *McConnell v. Sherwood*, 84 N. Y. 522; *Coyne v. Weaver*, id. 386. It is said in *Ginther v. Richmond*, 18 Hun, 232, that an assignment is not invalidated by a provision giving the assignees the right to compromise or compound any claim by taking a part for the whole where they shall deem it expedient to do so. But attention is called to the decision to the contrary in the cases above cited. A general assignment of firm property by one partner to pay his individual debt is fraudulent and void. *Platt v. Hunter*, 11 Week. Dig. 300. A provision in a partnership assignment, providing for payment of individual debts of one creditor, is a fraud on the partnership creditors, and they may set it aside. *Schiele v. Healey*, 61 How. 73.

A general assignment executed by two partners of all their co-partnership and individual estates in trust to pay the debts of the firm, and to return any surplus to the assignors, which contains no provision for the payment of their individual debts, is void as to individual creditors, not only as to the individual property of the partners, but as to the firm property also. *Wheeler v. Childs*, 22 App. Div. 613, 48 Supp. 1023, 82 St. Rep. 1023.

After providing for the payment in full of certain specified claims, "if there are sufficient proceeds applicable according to law," the assignment provided that after fully paying and discharging such claims the assignee should pay all other debts and liabilities, and that if the residue was not sufficient to pay such debts and liabilities in full, he should apply it in payment of the "debts and liabilities mentioned in the preference" ratably. *Held*, that the assignment was invalid, as it made no provision for the payment of the unpreferred creditors unless they could be paid in full. *Eliasoff v De Wandeclear*, 21 Misc. 695, 47 Supp. 1048, 81 St. Rep. 1048.

The fact that an insolvent debtor, in contemplation of making an assignment for the benefit of creditors, confesses judgment to creditors, one of whom is his wife, and permits levies to be

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made thereunder before he executes the assignment, does not of itself render the assignment fraudulent, but may be considered on the question whether on the whole transaction there was an attempt to defraud; and where in addition to such fact it appears that the assignor did not turn over to the assignee a portion of the receipts of his business, but gave the money to his wife, the assignment should be held void. *Kaughran v. H. B. Claflin Co.*, 22 App. Div. 149, 47 Supp. 925, 81 St. Rep. 925.

A direction for the payment of more than one-third of the assets to specified creditors does not of itself vitiate the assignment. *Eliasoff v. De Wandelaar*, 21 Misc. 695, 47 Supp. 1048, 81 St. Rep. 1048.

The giving of a chattel mortgage and transfer of account by an insolvent debtor as security for the claims of some of his creditors, which mortgage and transfer cover only a portion of his property do not violate the provisions against preferences in the General Assignment Act. *Delancy v. Valentine*, 154 N. Y. 692, 49 N. E. Rep. 65.

The debtor must devote all his property absolutely to the payment of his debts in order that the assignment may be valid. *Oliver Lee & Co.'s Bank v. Talcott*, 19 N. Y. 146; *Burdick v. Post*, 12 Barb. 168; *Rathbun v. Platner*, 18 Barb. 272; *Goodrich v. Downs*, 6 Hill, 438. The debtor may except from the assignment, property exempt from levy and sale under execution. *Dolson v. Kerr*, 5 Hun, 643; *Dow v. Platner*, 16 N. Y. 562. But he may not reserve moneys for his own maintenance and support. *Grover v. Wakeman*, 11 Wend. 187; *Butler v. Van Wyck*, 1 Hill, 438; *Goodrich v. Downs*, 6 Hill, 438. Since this is in conflict with the rule that all the property covered by the assignment must be unreservedly applied for the benefit of creditors of the assignor. *Mackie v. Cairns*, 5 Cow. 547; *Currie v. Hart*, 2 Sandf. Ch. 353.

An assignment takes effect from its delivery, and the requirements of the statute are regarded as directory merely; an omission to obey it does not invalidate the assignment. *Ryan v. Webb*, 39 Hun, 435; *Warner v. Jaffray*, 96 N. Y. 248; *McBlain v. Spellman*, 35 Hun, 263. The assignment should be recorded in the proper office for the recording of deeds, where it conveys real estate. *Simon v. Kaliski*, 6 Abb. Pr. (N. S.) 234; 37 How. 249; *Ferrero v. Buhlmeyer*, 34 How. 34. But delivery is necessary to the validity of the assignment. *Brackett v. Barney*, 28

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N. Y. 333; *Mitchell v. Bartlett*, 51 N. Y. 447; *Kingston v. Koch*, 57 Hun, 12; *McIlhargy v. Chambers*, 117 N. Y. 532. Delivery to a clerk for recording is *prima facie* evidence of delivery. *Rathbun v. Rathbun*, 6 Barb. 98; *Van Valen v. Schermerhorn*, 22 How. 416; *Freyer v. Rockefeller*, 63 N. Y. 268.

An assignment executed with no intention of having it delivered, and intended only as a shield in cases of necessity, does not become operative. *Kingston v. Koch*, 57 Hun, 12, 32 St. Rep. 4, 10 Supp. 163. An assignment is void in case it is not delivered, or in case delivery is not accompanied by a change in the possession of the property. *South Danvers Bk. v. Stevens*, 5 App. Div. 392, 39 N. Y. Supp. 290.

But the mere fact that the assignor assists the assignee about the business is insufficient to prove that immediate possession was not taken and held by the assignee. *Ryder v. Duffy*, 73 Hun, 605, 26 Supp. 369, 56 St. Rep. 836. An assignment made, for the purpose of preventing parties who are bringing suits against the assignor from getting paid in full upon judgment and execution is not void. *Davis v. Howard*, 73 Hun, 347, 55 St. Rep. 762, 26 Supp. 194.

An honest mistake as to the amount due on a claim will not render an assignment void. *Roberts v. Victor*, 28 St. Rep. 100, 54 Hun, 461, reversed, 130 N. Y. 585, 42 St. Rep. 729. Where an assignment directed the assignee to pay a certain sum which through interest computed by annual rents was too large, and the excess was repaid, it was held not to render the assignment fraudulent and void. *Pcyser v. Meyers*, 135 N. Y. 599, 48 St. Rep. 825, affirming 45 St. Rep. 413.

Where the assignors were allowed to complete without opposition, unmanufactured stock, which was practically valueless until manufactured, and were allowed to use machinery for that purpose and until the stock was sold, it was held not to invalidate the assignment. *Turney v. VanGelder*, 68 Hun, 481, 52 St. Rep. 664, 23 Supp. 27, affirmed, 143 N. Y. 632, 60 St. Rep. 876. Transactions which take place a considerable time prior to the making of the assignment and which are independent thereof have no bearing upon the question of assignment. *Cutter v. Hume*, 43 St. Rep. 242, 17 Supp. 255.

In order to invalidate an assignment for the benefit of creditors there must be actual proof of fraudulent intent upon the part of

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the assignor when he executed the instrument, and where the acts of the parties were as consistent with innocence as with guilt the assignment must stand. *Morril v. Kazis*, 8 App. Div. 304. See the rule laid down in *Dunham v. Waterman*, 17 N. Y. 9, where it was held that where a part of the assigned property consisted of unfinished machinery, engines in process of manufacture, and the assignment provided for their completion, the assignment was void. However, in *Robins v. Butcher*, 104 N. Y. 575, where the assignment provided that "should it be necessary and to the better performance of the trust," that assignee shall have power "to finish such work as is unfinished," it was held that this gave no power to the assignee to determine as to the necessity; but that the power conferred was conditioned upon a necessity to be determined by the court; that the assignee could not safely exercise it except under the order of the court.

Judgment which was not confessed or taken in contemplation of a general assignment, or in attempt to evade the statute, does not render the assignment void if made in good faith. *Thalheimer v. Klapetsky*, 36 Rep. 116, 12 Supp. 941, affirmed, without opinion, 129 N. Y. 647. Where debtors make an assignment of their property with the intention of merely delaying their creditors in the prompt collection of their debts, this purpose is as fatal to the assignment as though it had actually been intended to defraud the creditors. *Buell v. Rope*, 6 App. Div. 113.

A composition between the assignor and a favored creditor to reserve to the assignor a benefit from the property is fatal to the validity of the assignment. *Clark v. Andrews*, 46 St. Rep. 399, 19 Supp. 211. Where an assignor prefers a creditor in such a form that there issues out of the preference a benefit to himself, the assignment is void. *Elias v. Farley*, 2 Abb. Dec. 11, 3 Keyes, 398, 5 Abb. Pr. (N. S.) 39; *Swift v. Hart*, 35 Hun, 128; *Stafford v. Merril*, 62 Hun, 144; *Barnum v. Hempstead*, 7 Paige, 568; *Lansing v. Woodworth*, 1 Sandf. Ch. 43; *Norton v. Matthews*, 58 St. Rep. 806; *Matter of Gordon*, 49 Hun, 370.

This rule, however, does not apply to a provision contained in an assignment, for the payment of "debts due and to grow due." *Van Dine v. Willett*, 38 Barb. 319, 24 How. 206; *Read v. Worthington*, 9 Bosw. 617. Nor does it forbid provisions for future liabilities, such as indorser, bailee, or surety. *Cunningham v. Freeborn*, 11 Wend. 241, 1 Edw. Ch. 256, 3 Paige, 557; *Keteltas*

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v. *Wilson*, 36 Barb. 298, 23 How. 69; *Webb v. Thomas*, 49 St. Rep. 462; *Griffin v. Marquahardt*, 21 N. Y. 121; *Loeschigk v. Jacobson*, 26 How. 526; *Brainerd v. Dunning*, 30 N. Y. 211.

Provisions calculating to hinder and delay the immediate application of the assigned property to the payment of the debts will avoid the assignment. *Brigham v. Tillinghast*, 13 N. Y. 215; *Benedict v. Huntington*, 32 N. Y. 219. Such a direction as delaying the conversion of the property into money. *Mcacham v. Sternes*, 9 Paige, 398; *Woodburn v. Mosher*, 9 Barb. 255; *Murphy v. Bell*, 8 How. Pr. 468. But the latter authorities, however, do not hold the rule so strictly. See *Ogden v. Peters*, 21 N. Y. 23; *Griffin v. Marquahardt*, 21 N. Y. 121; *Jessup v. Hulse*, 21 N. Y. 168; *Townsend v. Stearns*, 32 N. Y. 209; *Sutherland v. Bradner*, 39 Hun 519; *Clapp v. Utley*, 16 How. 384; *Bellows v. Partridge*, 19 Barb. 176; *Wilson v. Robertson*, 21 N. Y. 587. Any provision of the assignment which tends to delay the sale of the property may be regarded as a fraud upon creditors. *Work v. Ellis*, 50 Barb. 512; *Halstead v. Gordon*, 34 Barb. 422; *Hart v. Crane*, 7 Paige, 37. So a power in the assignment to the assignee to sell on credit vitiates the assignment. *Nicholson v. Leavitt*, 6 N. Y. 510; *Porter v. Williams*, 9 N. Y. 142; *Rapalee v. Stewart*, 27 N. Y. 310; *Wilson v. Robertson*, 21 N. Y. 587; *Gates v. Andrews*, 37 N. Y. 657. It will not vitiate the assignment to direct that the assignee shall sell only for cash. *Van Rossun v. Walker*, 11 Barb. 237; *Carpenter v. Underwood*, 19 N. Y. 520; *Grant v. Chapman*, 38 N. Y. 293.

In *Coyne v. Weaver*, 84 N. Y. 386, the assignment empowered the assignee "to collect choses in action with the right to compound for the said choses in action, taking a part for the whole, when he shall deem it expedient." It was held that the clause was to be construed as simply authorizing the assignee to compromise such claims as in a sound discretion the interests of the trust required, and that as so construed it was not in conflict with the statute and did not invalidate the assignment.

In *McConnell v. Sherwood*, 84 N. Y. 522, an assignment authorizing the assignee "to collect the notes, accounts, and choses in action," and "to compromise with the creditors" of the assignor for all his debts and liabilities, if in the opinion of the assignee "it would be advantageous," to the creditors of the assignor, it was held that the effect and intent of this provision was to delay

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the payment of debts and create a trust for the assignor, and so rendered the assignment void. In the same cause, however, it was held that the clause authorizing the assignee to collect notes, accounts, and choses in action, and taking the part of the whole when the party of the second part (the assignee) shall deem it expedient to do so, was held to give power to compromise, and not to invalidate assignment.

In *Bagley v. Bowe*, 105 N. Y. 171, it was held that an assignment is not invalidated by a provision therein authorizing the assignee to compromise and compound debts owing to the assignor. Where the instrument and the acts of the parties are fairly capable of innocent construction by the general rules of law, it should be given that construction which will uphold rather than defeat the general intent and provisions of the instrument. *Roberts v. Buckley*, 145 N. Y. 215, citing *Townsend v. Stearns*, 32 N. Y. 209; *Shultz v. Hoagland*, 85 N. Y. 464; *Bagley v. Bowe*, 105 N. Y. 171; *Crook v. Rindskopf*, 105 N. Y. 476.

Such a construction of the provisions of the assignment should be adopted as will sustain rather than defeat it. *Pearson v. Eggert*, 15 App. Div. 125, 44 Supp. 330, citing *Roberts v. Buckley*, 145 N. Y. 215; *Coyne v. Weaver*, 84 N. Y. 386; *Townsend v. Stearns*, 32 N. Y. 215. Mortgages or transfers made by an assignor just before an assignment are not necessarily illegal. *Otis v. Bertholf*, 37 St. Rep. 172, 13 N. Y. Supp. 445; affirmed without opinion, 129 N. Y. 673. A secret loan to an insolvent debtor, upon his promise to pay the lenders in preference, should he subsequently be compelled to make an assignment, is not a fraud upon the creditors of the firm. *Smith v. Munro*, 1 App. Div. 177, 72 St. Rep. 215. Assignment of a firm was set aside where the assignors on the eve of the assignment withdrew a large sum from the funds of the firm and applied it in part upon the payment of a pretended debt to a relative, the court disregarding the testimony of the assignors as to the debt's existence. *Newmann v. Clapp*, 20 Misc. 67, 44 Supp. 439, citing among other cases, *Coursey v. Morton*, 132 N. Y. 556; *Loos v. Wilkinson*, 110 N. Y. 195; *Bulger v. Rosa*, 119 N. Y. 459.

The mere fact that the debtor paid a note on presentation the day before he made a general assignment, or that on the day of assignment he drew a sum of money from the bank, is insufficient to justify a finding that the assignment was invalid. *Na-*

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tional Hudson River Bk. v. Chaskin, 28 App. Div. 311; *sub nom. National Hudson River Bk. v. Davison*, 51 Supp. 64, 85 St. Rep. 64.

A creditor of a foreign corporation doing business in this State who has been a party to the proceeding and acted as the depository of the assignee is bound by the decree of distribution, and although it does not accept the dividend, is estopped from maintaining an action and attaching the property of the corporation on the theory that its assignment was void because contrary to the laws which created it. *First Nat. Bk. of Saratoga Spgs. v. Rock City Falls Paper Co.*, 22 Misc. 599, 50 Supp. 746, 84 St. Rep. 746. To render a general assignment void for fraud, it is not necessary that the assignee should participate in the fraudulent intent; it is sufficient if the intent of the assignors was fraudulent. *Koechl v. Liebing & Oehm Brewing Co.*, 26 App. Div. 573 50 Supp. 568, 84 St. Rep. 568.

If an assignment is executed with an honest intent, no subsequent illegal acts on the part of the assignor can invalidate it, but such acts may in certain cases be considered in determining what was the original intent. The question whether such an assignment is made with intent to defraud creditors is one of fact; in some cases, upon undisputed evidence, the fact may be considered as matter of law, and the presumption of the intent to defraud may be deemed conclusive. *Roberts v. Buckley*, 80 Hun, 58, affirmed 145 N. Y. 215, which holds that an assignment for the benefit of creditors must be interpreted like other instruments according to the intent of the parties, and if possible, such a construction given it as will sustain rather than defeat it. The burden is on the party charging fraud to show affirmatively some illegal provision or some act consciously and purposely done which is inconsistent with an honest purpose. Further, that the question as to the validity of the assignment is to be determined by the facts existing at the time when it was made, and if, when delivered, it represented an honest purpose and was made in good faith, fraud cannot be fastened upon it thereafter by any act or statement, whether verbal or written, of the assignor. A direction in the assignment for the payment of a debt at a greater amount than is justly due will not invalidate the assignment in the absence of a fraudulent intent.

An injunction, forbidding judgment debtors from transferring or otherwise disposing of their property, contained in an order

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made in supplementary proceedings, prohibits them from executing and delivering an assignment of their property without preferences under the General Assignment Act. *Canda v. Gollner*, 73 Hun, 493, citing *McCorkel v. Herman*, 117 N. Y. 297.

When the assignee, on the request of a general creditor, refuses to bring an action to set aside a fraudulently confessed judgment by the debtor, the creditor bringing the suit for such purposes may have an injunction *pendente lite*, against the payment of the proceeds of an execution to the judgment creditor. *Ricssner v. Cohn*, 1 Supp. 161; compare *Third Nat'l Bk. v. Clark*, 1 Supp. 207.

The omission of the provisions for expenses of the trust and claims for labor does not invalidate the assignment. *Chambers v. Smith*, 60 Hun, 249, citing *Richardson v. Thurber*, 104 N. Y. 606. A partner may apply his individual property to the payment of firm debts, but he must, if he undertakes to do so by a general assignment, respect the statute limiting preferences over either class of creditors. *Wheeler v. Childs*, 22 App. Div. 613, 48 Supp. 1023, 82 St. Rep. 1023. The use that is made of an assignment and the acts of the parties under it furnish data to judge of the motive and intent with which it was executed. *Wright v. Scaman*, 32 App. Div. 106, 52 Supp. 893, 86 St. Rep. 893.

A debtor who considered himself solvent and was pressed by only one creditor arranged to secure him, but put him off until he had made a general assignment to his father with preferences only to relatives. He thereafter continued to manage the business, and with what he earned and gave to his wife she bought up claims against him, and finally the assignee transferred the balance of the stock to the debtor's brother, a teacher, who paid therefor by an old debt and by money made out of the business. *Held*, that the facts showed that the assignment was made with intent to defraud creditors. *Wright v. Scaman*, 32 App. Div. 106, 52 Supp. 893, 86 St. Rep. 893.

A party accepting benefits of an assignment cannot attack it unless it is made to appear that such acceptance was made in ignorance of facts which justified the granting of relief. *Levy v. James*, 16 St. Rep. 761. An assignor's right of action for the specific performance of an agreement does not pass to his assignee under a general assignment for the benefit of creditors. *Wil-*

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liams v. Boyle, 1 Misc. 364. The title of a purchaser in good faith from an assignee is not affected by the fact that after he had paid the price but before he received his deed the assignment was set aside as in fraud of creditors. *Wilson v. Marion*, 25 Supp. 1066, affirmed, 147 N. Y. 589. An assignment is not rendered invalid by the fact that the indorser of a note is preferred instead of the holder thereof, although such indorser is one of the assignors. Nor is it avoided because of a mistake in the name of the creditors. The mere fact that the preferred creditor was formerly a special partner of the assigning firm does not render preference illegal. *Webb v. Thomas*, 49 St. Rep. 462.

A creditor, at whose instance a general assignment for the benefit of creditors is declared void as to him, is not entitled to share in moneys recovered upon the bond of the assignee. *Matter of Cantor*, 31 App. Div. 19, 52 N. Y. Supp. 382, 86 St. Rep. 382. An election by creditors to confirm a fraudulent assignment, made under a misunderstanding of the latter, cannot afterwards be revoked. They are concluded by the election made by them. *Levi v. James*, 49 Hun, 161. A creditor who has availed himself in any manner of an assignment made by his debtor or of the benefits to be derived therefrom is barred from taking any action to defeat the purpose of assignment, as a transfer of the property of the assignor. *Thompson v. Fry*, 51 Hun, 296.

A judgment creditor whose execution has been returned unsatisfied may maintain an action to set aside an assignment for creditors and prior fraudulent preferences, and thus secure payment of his judgment. *Koechl v. Liebinger & Oehm Brewing Co.*, 26 App. Div. 573, 50 Supp. 568, 84 St. Rep. 568. The filing of a claim of a creditor with the assignee is not such a recognition of the assignment as will prevent the creditor from maintaining an action to set it aside. *Koechl v. Liebinger & Oehm Brewing Co.*, 26 App. Div. 573, 50 Supp. 568, 84 St. Rep. 568. It is no defence to an action to set aside an assignment that it is valid on its face, if the prior disposition of the property was fraudulent and part of the same scheme. *Koechl v. Liebinger & Oehm Brewing Co.*, 26 App. Div. 573, 50 Supp. 568, 84 St. Rep. 568.

A retention by the assignor for the benefit of creditors of a substantial sum of money, accompanied by proof of prior fraud-

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ulent transactions and suspicious transfers to relatives authorizes the setting aside of the assignment. *Feldstein v. Richardson*, 27 App. Div. 3, 50 Supp. 105, 84 St. Rep. 105. The execution of a fraudulent mortgage prior to the making of a general assignment and the omission of assets from the schedules are not frauds in the assignment but upon it, and cannot be made a basis for setting it aside. *Sweetser v. Davis*, 26 App. Div. 398, 49 Supp. 874, 83 St. Rep. 874. A general creditor of a corporation who has not procured judgment cannot, in an action for receiver, attack a general assignment made by the corporation. *Walter v. F. E. McAllister Co.*, 21 Misc. 747, 48 Supp. 26, 82 St. Rep. 26.

SUB. 4. INTERPRETATION AND CONSTRUCTION OF ASSIGNMENT.

The circumstances surrounding the execution bear so close a relation to the subject that a discussion of the requisites of an assignment would be incomplete without calling attention to some of the grounds upon which the courts have held assignments invalid, outside of the matters appearing on the face of the instrument. The intent of the assignor in making the assignment is held to be material. If it be shown that the intent was to hinder, delay, or defraud creditors, the assignment will be declared invalid, and this is true even though the assignor acted in good faith, as he is not a purchaser for value. *Rathburn v. Platner*, 18 Barb. 272; *Work v. Ellis*, 50 id. 512; *Mead v. Phillips*, 1 Sandf. Ch. 83; *Putnam v. Hubbell*, 42 N. Y. 106; *Ruhl v. Phillips*, 48 id. 125; *Dudley v. Danforth*, 61 id. 626; *Wilson v. Kelly*, 24 Barb. 105; *Matthews v. Poultney*, 33 id. 127; *Talcott v. Hess*, 31 Hun. 282; *Schultz v. Hoagland*, 85 N. Y. 464. Contemporaneous acts of the assignor are evidence of intent. *Peck v. Crouse*, 46 Barb. 151; *Haydock v. Coope*, 53 N. Y. 68; *Byrd v. Hall*, 2 Keyes, 646; *Wilson v. Lamont*, 10 How. 175. And if the assignor remains in possession of the assigned property, his acts and declarations while in possession are competent evidence. *Adams v. Davidson*, 10 N. Y. 309; *Newlin v. Lyon*, 49 id. 661; *Tilson v. Terwilliger*, 56 id. 273. Or a conspiracy between assignor and assignee to defraud may be shown. *Cuyler v. McCartney*, 40 N. Y. 221. The retaining of possession by the assignor is, under the statute, presumptive evidence of fraud. *Adams v. Davidson*, 10 N. Y. 309; *Cram v. Mitchell*, 1 Sandf. Ch. 251; *Connah v. Sedgwick*, 1 Barb. 210; *Van Buskirk v. Warren*, 2 Keyes, 119; *Ball v. Loomis*,

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29 N. Y. 412; *Pine v. Rikert*, 21 Barb. 469; *Dolson v. Kerr*, 5 Hun, 643; *Wilson v. Forsyth*, 24 Barb. 105; *Griswold v. Sheldon*, 4 N. Y. 581; *Terry v. Butler*, 43 Barb. 395; *Russell v. Lasher*, 4 id. 232; *Dewey v. Adams*, 4 Edw. Ch. 21; *Van Nest v. Voc*, 1 Sandf. Ch. 4; *Stoddard v. Butler*, 20 Wend. 507; *Wilson v. Ferguson*, 10 How. 175. But the presumption of fraud may be rebutted. *Hall v. Tuttle*, 8 Wend. 375; *Smith v. Acker*, 23 id. 653. This rule is not absolute as to real estate, but where the assignor remained in possession of real estate for a long period it has been applied. *Every v. Egerton*, 7 Wend. 259; *Clute v. Newkirk*, 46 N. Y. 684; *Bank of Orange Co. v. Fink*, 7 Paige, 87.

But declarations by the assignor subsequent to the execution of the instrument, and when not in possession, are no evidence of fraudulent intent in making the assignment. *Peck v. Crouse*, 46 Barb. 151; *Cuyler v. McCartney*, 40 N. Y. 221; *Ogden v. Peters*, 15 Barb. 560. Nor any subsequent fraudulent act not connected with the assignment or possession of the property. *Schultz v. Hoagland*, 85 N. Y. 464. An assignment, by the terms of which the assignee is directed, after the payment of certain preferred creditors, to return the surplus, if any, to the assignor, without making any provision for the other general creditors, is void as against the latter. It cannot be validated as against such a creditor who has obtained a judgment, by a new assignment. Such second assignment is ineffectual for any purpose, as the assignor has no power to convey. *Sutherland v. Bradner*, 39 Hun, 134. The providing for payment of fictitious debts is fraudulent, and renders the assignment void. *Terry v. Butler*, 35 Barb. 395; *Jacobs v. Remsen*, 36 N. Y. 668; *Brainard v. Dunning*, 30 N. Y. 211; *American Ex. Bank v. Webb*, 36 Barb. 291; *DeCamp v. Marshall*, 2 Abb. (N. S.) 373; *Webb v. Daggett*, 2 Barb. 9; *Fiedler v. Day*, 2 Sandf. 594; *Mead v. Phillips*, 1 Sandf. Ch. 83; *Bostwick v. Menck*, 40 N. Y. 383. But a debt outlawed, or to which there is a defence, is not in this category. *Livermore v. Northrup*, 44 N. Y. 107; *Murray v. Judson*, 9 id. 73. A provision for claims that have been paid is fraudulent. *Talcott v. Hess*, 31 Hun, 282. As is an omission of assets from the schedule if intentional. *Schultz v. Hoagland*, 85 N. Y. 464. As is the fact that the assets are to the knowledge of the assignor largely in excess of debts. *Livermore v. Northrup*, 44 N. Y. 107. But the mere fact that incidental delay will result to the creditors, and

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that the assignor desires to gain time or to prevent a levy under execution, does not constitute fraud. *Nicholson v. Leavitt*, 6 N. Y. 510; *Townsend v. Stearns*, 32 id. 209; *Griffin v. Marquardt*, 21 id. 121; *Welles v. Marsh*, 30 id. 344. Assignment by persons out of the State, and assignment by non-residents, made and delivered in this State, are not regarded as a foreign assignment. *Grady v. Bowes*, 11 Daly, 259. An assignment of real estate is governed by the law of the State in which it is situated, but a transfer of personal property is controlled by the law of the residence of the assignor, unless it is made in the face of a positive statute or rule of law of the place where the property is situated. *D'Ivernois v. Leavitt*, 23 Barb. 663; *Nicholson v. Leavitt*, 4 Sandf. 252; *Moore v. Willett*, 35 Barb. 663; *Guillander v. Howell*, 35 N. Y. 657; *Ockerman v. Cross*, 54 id. 29; *Warner v. Jaffray*, 96 id. 248. A debtor will not be permitted, at or before the time the debt is created, by a secret tacit agreement, or understanding, with any one or more of his creditors, to make an engagement in reference to his property, by which their debts shall, in case of an emergency, be preferred under any and all circumstances, and by such an arrangement in effect place a secret mortgage on his property. *National Park Bank v. Whitmore*, 40 Hun, 499.

An assignment for the benefit of creditors must be construed like other instruments, according to its intent and purport, and, if possible, such a construction given to it as will uphold rather than defeat it. The party charging fraud in such an instrument must show affirmatively some illegal provision, or some act consciously and purposely done which is inconsistent with an honest purpose. The question as to the validity of the assignment is to be determined by the facts existing at the time it was made, and if, when delivered, it represented an honest purpose and was made in good faith, fraud cannot be fastened upon it thereafter by any act or statement, whether verbal or written, of the assignor. *Roberts v. Buckley*, 145 N. Y. 215. A direction in the assignment for the payment of a debt at a greater amount than is justly due, will not invalidate the assignment in the absence of fraudulent intent. When the instrument is assailed as fraudulent because it provides for the payment of a fictitious debt, it must appear that the assignor, with a fraudulent purpose in view, knowingly and consciously directed the payment of a claim which to his

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knowledge had no existence, either in whole or in some substantial part. *Roberts v. Buckley*, 145 N. Y. 215.

The assignment is not rendered void by a provision which authorizes the assignee to employ agents at a reasonable compensation to carry on the business. *Casey v. Janes*, 37 N. Y. 608; *Mann v. Whitbeck*, 17 Barb. 388; *Jacobs v. Remsen*, 36 N. Y. 668. Provisions exempting an assignee from any legal liability renders the assignment void. *Litchfield v. White*, 3 Sandf. Ch. 545, affirmed in 7 N. Y. 438. But a clause exempting assignee from liability for debts which he was unable to collect will not render assignment void. *Casey v. Janes*, 37 N. Y. 608. If the general assignment is made by the assignor with the intent to hinder, delay, and defraud creditors, it is invalid as against creditors, no matter how free from any knowledge or participation in the fraud the assignee may be; the assignee not being a purchaser for value under the provisions of the Revised Statutes. *Starin v. Kelly*, 88 N. Y. 418; *Cuyler v. McCartney*, 40 N. Y. 21; *Schofield v. Scott*, 20 St. Rep. 815; *Loos v. Wilkinson*, 110 N. Y. 195; *Putnam v. Hubbell*, 42 N. Y. 106; *Talcott v. Hess*, 31 Hun, 282. Fraud by one partner, even without the knowledge of the others, vitiates the assignment. *Schwab v. Kaughran*, 42 St. Rep. 407; *Imp. & Tr. Nat. Bank v. Burger*, 25 St. Rep. 136, affirmed, without opinion, 125 N. Y. 702; *Fourth Nat. Bank v. Burger*, 15 St. Rep. 103; *Warner v. Warren*, 46 N. Y. 228.

But this rule does not apply where a fraudulent act on the part of one of the partners is entirely outside the firm business. *Victor v. Leavy*, 72 Hun, 263. The validity of the assignment cannot be affected by the fraudulent or illegal acts of the parties subsequently thereto, although acts immediately preceding, and which necessarily lead up to the assignment, being inseparable from the execution of the assignment, must be deemed a part of the general purpose. *First Nat. Bank v. Warner*, 55 Hun, 120; *Davis v. Harrington*, 55 Hun, 109; *Shultz v. Hoagland*, 85 N. Y. 464; *Hardmann v. Bowen*, 39 N. Y. 196; *White v. Benjamin*, 3 Misc. 490.

Where there are different acts which lead up to the assignment, and the assignment is only the culmination of the whole scheme, fraud in any one of these acts will vitiate the assignment. *Rothschild v. Salomon*, 52 Hun, 486, 24 St. Rep. 20, 5 Supp. 865. Where an assignment was made under which the assignee was to

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sell the stock to a person named, the money to be furnished that person by a creditor of the assignor, and the person was thereafter to carry on the business for the benefit of such creditor, but in his own name; *held*, that this action constituted fraud as against other creditors and rendered the assignment void. *Smith v. Wisc*, 132 N. Y. 172, reversing *Smith v. White*, 27 St. Rep. 227.

The fact that a debtor, immediately previous to making a general assignment, purchases a large number of diamonds, which he pledges for money borrowed to various persons at much less than their value, and that he transfers a large quantity of his stock in trade in payment of a fictitious debt, is to be taken into consideration in determining the question as to whether the assignment is fraudulent or not. *Davis v. Harrington*, 55 Hun, 109, 28 St. Rep. 909, 8 Supp. 218. But in the absence of an intent to delay, hinder, or defraud creditors, a mere preference exceeding in amount one-third of the assets of an insolvent, made by a transfer of the property to a *bona fide* creditor just prior to the assignment, makes neither the transfer void or fraudulent. The only remedy in such a case is by action in aid of the assignment and for the benefit of all creditors. *Abegg v. Bishop*, 142 N. Y. 286, 58 St. Rep. 788, reversing 66 Hun, 8, 20 Supp. 810.

The single circumstance that judgment is confessed at the same time that the debtor executed a general assignment does not, of itself standing alone, and irrespective of the other facts connected with the transaction, necessarily require that the judgment is a part of the assignment. *First Nat. Bank v. Bard*, 59 Hun, 529, 32 St. Rep. 1010. No inference of fraud must be drawn from the fact that the assignor had sent a large quantity of goods to be sold at auction where the prices realized for the most part were only sufficient to cover advances which had been made. *Smith v. Clarendon*, 25 St. Rep. 219, 6 Supp. 809.

Where defendant and other creditors procured the assignor to confess judgment to them and directed the sheriff to seize such assigned property, it was held that this did not raise a presumption of fraud. *Knower v. Cent. Nat. Bank*, 124 N. Y. 552, 37 St. Rep. 89. Where a firm, financially embarrassed, organized a corporation, to which was transferred all the firm's property in exchange for stock, and two years later members of the firm, as officers of the corporation, mortgaged its real property for advances

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to be made to the corporation, and three days later the firm made a general assignment, it was held that the execution of the mortgage by the assignors, as officers of the corporation, for money subsequently actually advanced to the corporation by the mortgagee, did not, *per se*, indicate an intent upon the part of the assignors to hinder, delay, or defraud firm creditors. *First Nat. Bk. v. Wood*, 86 Hun, 491, 33 Supp. 777, 67 St. Rep. 523.

Misrepresentations made at the time of the purchase of goods as to the indebtedness of a firm will not invalidate assignment subsequently made because it recognized an indebtedness which at that time did not exist; such representations have no connection whatever with the assignment. *Pool v. Ellison*, 56 Hun, 108, 30 St. Rep. 308, 9 Supp. 971. Threats to make an assignment for the purpose of preventing creditors from taking legal proceedings have been held to vitiate assignment. *Anthony v. Stype*, 19 Hun, 265; *Ross v. Wigg*, 34 Hun, 192; *Gasherie v. Apple*, 14 Abb. 64; *U. S. Net & T. Co. v. Alexander*, 42 St. Rep. 668; *Livermore v. Rhodes*, 27 How. 506; *Jaques v. Greenwood*, 12 Abb. 332; *Clark v. Taylor*, 37 Hun, 314; see, however, *Hess v. Blackeslee*, 2 St. Rep. 309.

An intentional withholding of the assets from the assignee is a fraud upon the assignment and renders it void. *Coursey v. Morton*, 132 N. Y. 556, 43 St. Rep. 673; *Chambers v. Smith*, 60 Hun, 248, 38 St. Rep. 218, 14 Supp. 706; *Hoyt v. Godfrey*, 88 N. Y. 669; *Shultz v. Hoagland*, 85 N. Y. 464; *Smith v. Perinc*, 121 N. Y. 376; *Illinois Watch Co. v. Payne*, 33 St. Rep. 967, affirming, without opinion, 125 N. Y. 597; *Schwab v. Kaughran*, 42 St. Rep. 407; *Davis v. Harrington*, 55 Hun, 109; *Untermeyer v. Hutter*, 26 Hun, 147, 28 St. Rep. 712, 8 Supp. 407; *Rothschild v. Salomon*, 52 Hun, 486; *Talcott v. Hess*, 31 Hun, 282; *Pasasavant v. Cantor*, 43 St. Rep. 247, 17 Supp. 37. An intentional omission of property from the schedule filed indicates fraudulent intent on the part of the assignor. *Talcott v. Hess*, 31 Hun, 282, 4 St. Rep. 62, 13 St. Rep. 571; *Pittsfield Nat. Bank v. Tailer*, 60 Hun, 130; *Shultz v. Hoagland*, 85 N. Y. 464.

As to the filing by assignor of schedule containing fictitious debts, where it is done with fraudulent intent, see *Terry v. Butler*, 43 Barb. 395; *Talcott v. Hess*, 31 Hun, 182; *Roberts v. Victor*, 130 N. Y. 585. Assignment must be followed by the immediate delivery of the assigned property and by an actual and continued

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change of the possession, or it will be presumed fraudulent. *Van Buskirk v. Warren*, 2 Keyes, 214; *Griswold v. Sheldon*, 4 N. Y. 581; *Ball v. Loomis*, 29 N. Y. 412; *McConihe v. Derby*, 62 Hun, 90; *Adams v. Davidson*, 10 N. Y. 309.

As has been heretofore remarked, up to within a recent date the courts have been exceedingly astute to discover grounds upon which assignments might be set aside, while the tendency of the latter decisions is much more favorable towards sustaining them. This fact must be borne in mind in the examination of authorities, so that many of the earlier authorities declaring assignments void may be regarded as practically obsolete in view of the later decisions on this subject. However, it was said in *Townsend v. Stearns*, 32 N. Y. 209, that an assignment would be upheld if the language permitted it rather than be defeated. To the same effect, see *Brainerd v. Dunning*, 30 N. Y. 211. In *Coyne v. Weaver*, 84 N. Y. 386, it is said: "The meaning and intention of the assignor is to be gathered from the whole instrument, and where two different constructions are possible, this is to be chosen which upholds and does not destroy the instrument." It is held that a literal, rigid construction of the language need not be adopted, and that the court would not accept any such interpretation unless compelled by the plain and inflexible provisions. That construction will be preferred which will uphold rather than destroy the instrument; so held in *Bagley v. Bowe*, 105 N. Y. 179. But where the assignment on its face indicates an intention to defraud creditors, it is void. Assignments which authorize such a disposition of the effects of the assignor to be made as will operate to defraud creditors of the right to have the property applied to the payment of their claims are fraudulent as against such creditors. *Lester v. Pollock*, 3 Robt. 691, 692; *Kavanagh v. Beckwith*, 44 Barb. 192; *McConnel v. Sherwood*, 84 N. Y. 522.

Fraudulent intent, if found to exist, vitiates the entire instrument. *Fidler v. Day*, 2 Sandf. 594; *O'Neil v. Salmon*, 25 How. Pr. 246; *Wakeman v. Grover*, 4 Paige, 23; *Mackie v. Cairns*, 5 Cow. 547; *Nat. Bank of Granville v. Cohn*, 42 Hun, 381; *Norton v. Matthews*, 58 St. Rep. 806; *Billings v. Russell*, 101 N. Y. 226. This rule applies only to creditors who do not consent to the assignment, and not as between assignor and assignee. It may be valid as between the parties, but fraudulent as to creditors. *Smith v. Howard*, 20 How. 121; *Waterbury v. Westervelt*, 9 N. Y. 598; *Knower v. Central Nat. Bank*, 124 N. Y. 552.

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The assignee has no right to compel the creditor to give a release for receiving a benefit under the assignment. *Austin v. Bell*, 20 Johns. 442; *Chadwick v. Burrows*, 42 Hun, 39; *Armstrong v. Byrne*, 1 Edw. Ch. 79. An assignment creating a trust in the property for the benefit of the assignor is void. *Goodrich v. Downs*, 6 Hill, 438; *Collomb v. Caldwell*, 16 N. Y. 484; *Wilson v. Robertson*, 21 N. Y. 587. This is true where the assignor reserves any benefit from the assigned property, which renders the assignment absolutely void. *Grover v. Wakeman*, 11 Wend. 187; *Mackie v. Cairns*, 5 Cow. 547; *Jackson v. Parker*, 9 Cow. 73; *Swift v. Hart*, 35 Hun, 128; *Matter of Gordon*, 49 Hun, 370; *Norton v. Matthews*, 58 St. Rep. 806. Reservation to the assignor of the right to revoke assignment renders it void. *Riggs v. Murray*, 2 Johns. Ch. 565; *Reichenbach v. Winkhaus*, 67 How. 512.

A provision in an assignment directing the application of the assets to the payment by the assignee of all the assignor's debts and liabilities, due or to grow due, applies only to such debts and liabilities as can be ascertained or fixed when the assignment was made. It does not include a contingent liability, the amount of which, if it ever arises, can only thereafter be definitely fixed and ascertained. *Matter of Hevner*, 144 N. Y. 271, affirming 70 Hun, 56; distinguished, *People v. St. Nicholas Bank*, 151 N. Y. 592, holding that the situation of a receiver of an insolvent corporation is less restricted than that of an assignee under a general assignment for the benefit of creditors, whose powers and duties are prescribed by that instrument.

An individual creditor cannot maintain an action against a corporation to set aside a general assignment of such corporation on the ground that the transfer of its second mortgage bonds was made with an intent to give a preference. *Koechl v. Leibinger & Oehm Brew. Co.*, 24 Misc. 299, 52 Supp. 982. Where a partnership made a general assignment for its creditors which included property of its individual members, and the firm assets were exhausted in the distribution, creditors who did not recover judgment until after the death of a partner are, upon the insolvency of the other partners, entitled to share ratably with the individual creditors of the decedent who become such after the general assignment. *Matter of Stryker*, 24 Misc. 422.

Proof of actual fraud is necessary to set aside a bill of sale and a

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general assignment made without preference, on the ground that they were one transaction, and that such were in violation of the statute limiting preferences, is proved by the conclusive finding that prior to the execution of such instruments the debtor and grantee of the bill of sale conspired to defraud the debtor's creditors, that the instruments were one transaction, and that both were made with an intent to defraud, hinder, and delay the creditors. *Manning v. Beck*, 155 N. Y. 580.

If the debtor has made a valid assignment, subsequent judgment creditors cannot sue to set aside as fraudulent a prior conveyance made by the debtor, nor can any future event give them any standing in court. *Struckland v. Laraway*, 9 Supp. 761. A fraudulent assignment does not impair a mechanic's lien. *Murray v. Geretz*, 32 St. Rep. 241, 25 Abb. N. C. 161.

The lien of a judgment on real estate attaches at the time of docket in the county where the land lies, even as against a fraudulent assignment by the debtor for the benefit of creditors which is not void on its face, but voidable only, on account of fictitious debts in the schedules; and the lien of the judgment on lands is not waived by the mere commencement of a suit by the creditor to set aside the fraudulent assignment and asking for the appointment of a receiver and that the lands be sold, if the plaintiff does not finally take the relief demanded, but takes a decree declaring the assignment void. *N. Y. L. Ins. Co. v. Mayer*, 19 Abb. N. C. 93.

Where an assignment directed the payment in full "of the following described indebtedness of the assignor to the individuals hereinafter mentioned for the amounts specified, in their order," the assignee is justified in paying interest on such claims, although the fund applicable for such debts is exhausted before all preferred claims are paid. *Matter of Fay*, 6 Misc. 462, 27 Supp. 910.

An indebtedness for rent under a lease after a voluntary retaking of possession by the landlord is not a debt "due and owing" by the tenant to the landlord within the meaning of those words as used in a general assignment for benefit of creditors, and the tenant's assignee is without authority to pay it. *Matter of Willis*, 44 St. Rep. 470.

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ARTICLE III.

PREFERENCES. §§ 30, 29.

§ 30. In all general assignments of the estates of debtors for the benefit of creditors hereafter made, any preference created therein (other than for the wages or salaries of employes under chapter three hundred and twenty-eight of the Laws of eighteen hundred and eighty-four, and chapter two hundred and eighty-three of the Laws of eighteen hundred and eighty-six) shall not be valid except to the amount of one-third in value of the assigned estate left after deducting such wages or salaries, and the costs and expenses of executing such trust; and should said one-third of the assets of the assignor or assignors be insufficient to pay in full the preferred claims to which, under the provisions of this section, the same are applicable, then said assets shall be applied to the payment of the same *pro rata* to the amount of each said preferred claim.

§ 29. [Ch. 466, L. 1877.] Wages of employes preferred claim.

In all assignments made in pursuance of this act, the wages or salaries actually owing to the employes of the assignor or assignors at the time of the execution of the assignment, shall be preferred before any other debt; and should the assets of the assignor or assignors not be sufficient to pay in full all the claims preferred, pursuant to this section, they shall be applied to the payment of the same *pro rata* to the amount of each such claim. All sums due to truckmen or cartmen for the payment of freight and for the carriage of goods, wares and merchandise shall be deemed and treated as wages for the purposes of this act.

As amended by chap. 266, Laws 1897.

§ 29. [Chap. 466, L. 1877.] Wages of employes preferred claim.

In all distribution of assets under all assignments made in pursuance of this act, the wages or salaries actually owing to the employes of the assignor or assignors at the time of the execution of the assignment for services rendered within one year prior to the execution of such assignment, shall be preferred before any other debt; and should the assets of the assignor or assignors not be sufficient to pay in full all the claims preferred, pursuant to this section, they shall be applied to the payment of the same *pro rata* to the amount of each such claim.

As amended chap. 624, L. 1897.

Section 29 of chapter 466, Laws 1897, was again amended by chapter 624, Laws 1897, notwithstanding that it had previously been amended by chapter 266 of the same year. In § 1 of the second amendment, however, no reference is made to chapter 266, Laws 1897, and both chapters are given as they now stand in the Session Laws.

The general principle that a debtor may, so long as he applies all his property without fraud to the payment of his debts, pay in part or in full any one of his creditors he desires, is applied to a general assignment made by a debtor for the benefit of creditors, and he may make such preferences for such amounts as he prefers, provided always that it is for a subsisting debt. *Auburn*

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Exchange Bank v. Fitch, 48 Barb. 344; *Leavitt v. Blatchford*, 17 N. Y. 521; *Woodworth v. Sweet*, 51 id. 8; *Archer v. O'Brien*, 7 Hun, 146; *Jacobs v. Remsen*, 36 N. Y. 668; *Casey v. Janes*, 37 id. 608; *Putnam v. Hubbell*, 42 id. 106; *Dana v. Owen*, 54 id. 646.

It has been held that preferential assignments are looked upon with disfavor by the courts. *Mead v. Phillips*, 1 Sandf. Ch. 83; *Rathburn v. Platner*, 18 Barb. 272; *Wilson v. Ferguson*, 10 How. 175; *Nicholson v. Leavitt*, 4 Sandf. 472. But a different view is expressed in *Townsend v. Stearns*, 32 N. Y. 209, and in the later cases. An insolvent debtor may make an assignment with preferences. *Hauselt v. Vilmar*, 76 N. Y. 630. A preference given to the agent of the assignor's wife in payment of a balance with interest, of money received from the wife's father under an agreement to pay or secure it to the wife, held valid. *McCartney v. Welch*, 51 N. Y. 626. A preference to the assignor's wife is valid for money loaned, although the partner was married before the Enabling Act, in a case where the husband has declined to assert his marital rights. *Jaycox v. Caldwell*, 51 N. Y. 395. A limited partnership cannot prefer the investment of a special partner. *Whitcomb v. Fowle*, 7 Abb. N. C. 295. The right to prefer extends to all legal liabilities. The assignor may prefer a surety or indorser. *Lansing v. Woodworth*, 1 Sandf. 43; *Hendricks v. Walden*, 17 Johns. 438; *Cunningham v. Freeborn*, 11 Wend. 241; *Keteltas v. Wilson*, 36 Barb. 298; *Spaulding v. Strang*, 37 N. Y. 135. Or claims not yet due. *Read v. Worthington*, 9 Bosw. 617. Or creditors who had previously executed a release for a percentage up to the amount of such percentage. *Low v. Graydon*, 50 Barb. 414. And it does not affect the preference that claims have been purchased at a discount. *Power v. Graydon*, 10 Bosw. 630. Previously secured debts may be preferred but the security must first be exhausted. *Dimon v. Delmonico*, 35 Barb. 554; *Berly v. Lawrence*, 11 Paige, 581. And a preference may be made of a contingent liability. *Grant v. Chapman*, 38 N. Y. 293. But no discretion can be given the assignee as to the order of preference among creditors. *Boardman v. Halliday*, 10 Paige, 223; *Barnum v. Hempstead*, 7 id. 568; *Strong v. Skinner*, 4 Barb. 546.

The omission to make the preference required by law does not render the assignment void. *Richardson v. Thurber*, 6 St. Rep. 489; 104 N. Y. 606, affirming 39 Hun, 537; *Johnson v.*

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Kelly, 6 St. Rep. 388; *Busley v. Hartson*, 40 Hun, 121. *Contra*, *Harriot v. Masterson*, 38 id. 642; *Roberts v. Tobias*, 1 St. Rep. 245; *Smith v. Hartwell*, id. 241.

It is said, in *Berger v. Varrelman*, 127 N. Y. 281, that the provisions of the General Assignment Act limiting the amount of preferences in assignments is not confined to preferences in the assignment itself, but applies to those secured by separate instrument in contemplation of the assignment. It includes all the instrumentalities which the insolvent debtor, in contemplation of a general assignment, voluntarily employs to give a preference, and it seems that the want of knowledge on the part of a creditor so preferred that an assignment was contemplated, will not avail to validate the preference. This was followed by *Manning v. Beck*, 129 N. Y. 1, where it was held that the provision referred to was not intended to and did not prevent creditors from obtaining payment of or security, and thereby a preference, for his debt, even from an insolvent debtor, and while it seems that if he accepts such security with knowledge that the debtor intends to make an assignment, and that the security was executed in contemplation thereof, and that it will result in a violation of the provisions of the act, the security will be void; if the creditor accepts it in ignorance of any such existing intent on the part of the debtor, the provision does not apply, and the security is not rendered invalid by the fact that the debtor does thereafter execute an assignment.

In *Spellman v. Freedman*, 130 N. Y. 421, it was held that, under a like provision, that whatever is done with or in contemplation of the assignment with intent to defeat the provisions of the statute, is within the spirit of its prohibition.

In *Central National Bank v. Seligman*, 138 N. Y. 435, it was held that a preference exceeding in amount one-third of the assets of the insolvent, who made an assignment for the benefit of creditors, given either in the assignment itself or in a separate instrument, which may be construed as part of the assignment, does not, in the absence of any question as to the *bona fides* of the debt preferred, or of any claim of fraud, render the assignment wholly void; the statute operates upon the preference only, not upon the assignment itself or the title of the assignee; and it only operates to reduce the preference to one-third, and this, although the assignor and the preferred creditor were, when

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the act was done, operating as a preference, cognizant of the fact that it would exceed the statutory limit.

In *Abegg v. Bishop*, 142 N. Y. 286, it was held that a preference exceeding in amount one-third of the assets of the insolvent, made by a transfer of property to a *bona fide* creditor just prior to the execution of the assignment, does not, under the General Assignment Act, in the absence of any intent to delay, hinder, or defraud creditors, vitiate the transfer or assignment. In case the transfer and the assignment are to be taken together as one transaction, the restraint of the statute does not stamp the greater preference as fraudulent, but simply limits its effective operation to the permissible one-third. An action is not maintainable to set aside the assignment or transfer because of the unlawful preference. Reversing *Abegg v. Bishop*, 66 Hun, 8, *supra*. Same question somewhat discussed in *Galle v. Tode*, 148 N. Y. 270, at page 279, opinion by Haight, J., to the effect set out in *Manning v. Beck*, 129 N. Y. 1; *Maas v. Falk*, 146 N. Y. 34. The court holds substantially that if there is any scheme, plan, or purpose to secure the property for the benefit of the debtor to the exclusion of the creditors; or a purpose to cover up, secrete, or remove or dispose of the property of the debtor so as to prevent its coming to the hands of creditors; or to hinder and delay the creditors so as to force them to accept a compromise for less than what is actually due and owing them, then the transaction is void; and if the judgment creditor participates in such scheme and has knowledge of such purpose, or aids and abets it, he becomes a party to the fraud, and is liable to have any lien which may have been procured by his judgment postponed to that of the other creditors.

In *Tompkins v. Hunter*, 149 N. Y. 117, the question was discussed in the opinion of Martin, J. The court there states that it is unwilling to extend the doctrine of the *Berger* and *Spellman* (*supra*) cases, and holds that an absolute sale and transfer by an insolvent debtor of all his property, both real and personal, at its full value in payment of debts due to but one creditor, without making or contemplating any general assignment for creditors, is not within the provisions of the General Assignment Act prohibiting preferences in such assignments for more than one-third of the value of the assigned estate.

Again, in *Delancy v. Valentine*, 154 N. Y. 692, it was held that a transfer which does not cover all the debtor's property and is

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intended to secure only certain debts is not within the statute prohibiting preferences.

A preference exceeding in amount one-third of the assets of an insolvent who has made an assignment for the benefit of creditors, given either in the assignment itself or by a separate instrument which may be construed as part of the assignment, does not, under the General Assignment Act, prohibit such preference in the absence of any question as to the good faith of the debt preferred, or of any claim of fraud in rendering the assignment void. The statute operates upon the preference only, not on the assignment itself or the title of the assignee. It only operates to reduce the preference to one-third, and this although the assignor and the preferred creditor were, when the act was done operating as a preference, cognizant of the fact that it would exceed the statutory limit. In such case the rights of creditors can only be asserted by the assignee, or by an action in aid of the assignment for the benefit of all the creditors. *Central Nat. Bk. v. Seligman*, 138 N. Y. 435, reversing 64 Hun, 615. Cited and followed in *Abegg v. Bishop*, 142 N. Y. 286, and holding that an action is not maintainable to set aside the transfer or assignment because of the unlawful preference. It seems the only remedy is an action in aid of the assignment and for the benefit of all the creditors to subject the excess to the claims of creditors under that instrument, reversing 66 Hun, 8.

The latter rule is held in *Maas v. Falk*, 146 N. Y. 34, following this case, and it is said that an action should be brought in such case in behalf of all the creditors excluded by the transfers from a share in the debtor's assets, to secure and have a ratable distribution of two-thirds thereof. An absolute sale and transfer by an insolvent debtor of all his property both real and personal at its full value in payment of debts, but to one debtor, without making or contemplating any general assignment for creditors, is not within the provisions of the act prohibiting preferences in such assignments for more than two-thirds of the value of the assigned estate. *Tompkins v. Hunter*, 149 N. Y. 117, affirming 75 Hun, 612, limiting *Berger v. Varrellman*, 127 N. Y. 281; *Spellman v. Freedman*, 130 N. Y. 421; *Delaney v. Valentine*, 154 N. Y. 692; *Tompkins v. Hunter*, 149 N. Y. 117, *supra*, followed; and it is said that the same doctrine was held in *Brown v. Guthrie*, 110 N. Y. 435, and *Manning v. Beck*, 129 N. Y. 1.

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The latter case was again before the court in 155 N. Y. 577, when it was held that in a creditor's action to set aside a bill of sale and a general assignment without preferences, on the ground that they constituted one transaction, and as such contravened the statute limiting preferences in assignment, and upon the ground that the instrument was executed to hinder, delay, and defraud creditors. Proof of actual fraud essential to sustain a judgment for the plaintiff is imported by conclusive findings that, prior to the execution of the instrument, the debtor and the grantee of the bill of sale had conspired to defraud the debtor's creditors; that the instruments were one transaction, and that both were made with the intent of the debtor to hinder, delay, and defraud his creditors, of which intent the grantee of the bill of sale then had actual knowledge. Affirming *Manning v. Beck*, 77 Hun, 607.

Preferring a note given by a firm on the surrender of a note given by a former firm will not render assignment void. *Roberts v. Victor*, 54 Hun, 461, 28 St. Rep. 100, 7 Supp. 777, reversed, 130 N. Y. 585, 42 St. Rep. 729.

An assignment is not rendered invalid by reason of the fact that it in effect transfers to the assignee property subject to the payment of a chattel mortgage, which has not been filed as required by the statute, as such mortgage is valid against the mortgagor. *Kitchen v. Lowery*, 127 N. Y. 53, 37 St. Rep. 327, affirming 25 St. Rep. 252, 6 Supp. 867.

Where a firm made a loan to one of its partners on securities which he had falsified, and both the firm and the individual partner made assignments, the assignee of the firm may prove his claim against the assignee of the individual; the debt to the firm is subject to any diminution that may appear to his credit on its books either in the way of credit or profit and loss. *Matter of Walradt*, 13 App. Div. 142, 43 Supp. 379.

Preference of an individual debt of one member of the firm in an assignment for creditors made by the firm renders the assignment void. *Citizens' Bank of Perry v. Williams*, 128 N. Y. 77, reversing 12 N. Y. Supp. 678, 35 St. Rep. 542; same principle, *Schwab v. Kaughran*, 42 St. Rep. 407, 17 Supp. 926.

Where the effect of the assignment was the conversion of a large part of the partnership property for the payment of individual debts before the partnership debts were paid in full, and

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after which there was no assets to pay preferred creditors, the assignment was held fraudulent. *Booss v. Marion*, 129 N. Y. 536, 42 St. Rep. 265, affirming 35 St. Rep. 710, 12 N. Y. Supp. 765.

An assignment is fraudulent when it is made with intent to appropriate the firm property to the payment of a debt for which the firm is not responsible. *Imp. & Tr. Nat. Bank v. Burger*, 25 St. Rep. 136, 6 Supp. 189, affirmed, without opinion, 125 N. Y. 702. An assignment is void which prefers the notes of a retiring partner for his share in the business given at a time when the firm was insolvent. *Cohen v. Irion*, 26 St. Rep. 1, 7 Supp. 106, reversed, 126 N. Y. 665, on dissenting opinion below. Same rule, *Roe v. Hume*, 72 Hun, 1, 55 St. Rep. 336, 25 Supp. 576. The preference by one partner of a firm debt in an assignment of his individual property does not make the assignment void. *Ralph v. Brickell*, 28 St. Rep. 448, 7 Supp. 825.

Where a person in good faith loaned money to a surviving partner, which money was applied by such partner in the payment of the liabilities of the firm, the claim becomes one which in equity will be paid out of the firm assets in an accounting between the surviving partner and the personal representatives of the deceased partner, and equity will recognize the right of the surviving partner to have the money so borrowed and applied by him repaid out of the assets of the firm, and an assignment so directing is not void. *Durant v. Pierson*, 124 N. Y. 444, 36 St. Rep. 463, reversing 58 Hun, 190, 34 St. Rep. 194, 11 Supp. 842.

Payment of the individual debts of a partner by preference in an assignment is not fraudulent, where it appears that although the money was loaned to one partner it was for the benefit of the firm, and that the firm note was substituted for the indebtedness of the individual member, at a time when the firm was not shown to be insolvent. *Nordlinger v. Anderson*, 123 N. Y. 544, 34 St. Rep. 361, affirming 5 Supp. 609, 24 St. Rep. 240.

Where defendant carried on business in the firm name and plaintiff dealt with him knowing that his partner was dead, and the firm becoming insolvent, the creditors of the old firm were preferred in an assignment, it was held that the plaintiff could not object to the assignment, as he was not a firm creditor, but an individual creditor of the surviving partner. *Haynes v. Brooks*, 116 N. Y. 487, 27 St. Rep. 478, affirming 42 Hun, 528, 4 St. Rep. 587.

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Under the act of 1887, a debtor may still direct the application of one-third of the net proceeds towards the claim of one preferred creditor before they can be applied to payment of a second preferred creditor. The intention of the statute was only to restrict the quantity of the estate which could be so applied, and the provision that in case of insufficiency to pay the preferred claims in full, they should be applied on said claims *pro rata*, refers only to cases where the preferred creditors belong to the same class and are equally preferred in the order in which the one-third is directed to be applied. *Matter of Boyd*, 35 St. Rep. 37, 12 Supp. 284. There is no law which prevents a failing debtor from giving to any creditor that he may select, a preference by means of a confession of judgment for any valid debt. He may properly prefer his creditors to as great an extent as his property permits, provided he does so by giving mortgages or bills of sale or confession of judgment, instead of putting such preferences in a general assignment for the benefit of creditors, which alone the statute condemns. *Claflin Co. v. Arnheim*, 87 Hun, 236; *London v. Martin*, 79 Hun, 229, affirmed, 149 N. Y. 586, citing *Shotwell v. Decker*, 22 App. Div. 250.

Where an insolvent debtor in consideration of the general assignment transfers the bulk of his property to certain creditors for the purpose of evading the provisions of the General Assignment Act limiting the amount of preferences which may be contained in an assignment for the benefit of creditors to one-third of the assignor's estate, a creditor, who, although knowing that the debtor was insolvent, has accepted his preferential payment in ignorance of such guilty intent on the part of the assignor, cannot be charged with the amount thus received by him. *Shotwell v. Dixon*, 22 App. 258. Reiterating the rule that an insolvent debtor may prefer his creditors to as great an extent as his property permits, by any transfer thereof other than a general assignment. Citing and discussing numerous authorities. A general assignment for the benefit of creditors will be corrected where preferences are unintentionally directed to be paid. *Eliassof v. DeWandelaer*, 30 App. Div. 155; *sub nom. Eliassof v. Eckler*, 51 N. Y. Supp. 892, 85 St. Rep. 892, reversing *Eliassof v. DeWandelaer*, 21 Misc. 695, 47 N. Y. Supp. 1048, 81 St. Rep. 1048.

A preference granted by General Assignment Act includes wages and salaries actually owing to firm employes of the assignor at the

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time of the execution of the assignment, and is not limited to the wages and salaries of those in his employ at that time. The amendment of 1886 is not retroactive and creates no preference in favor of employes for wages earned before its passage. A preference granted by the old amendment is not nullified by the fact that the assignor had given an employe a promissory note for the amount of his wages. *Matter of Scott*, 148 N. Y. 588; *Matter of Heath*, 46 Hun, 114. Where an employe had received notes for compensation and in excess thereof and transferred them to a third party, he loses his preference thereby, even though he again becomes the owner of the notes. *Spencer v. Hodgman*, 57 Hun, 490.

A preferential assignment by an insolvent of all his estate in trust for the payment of only a part of his creditors, which provides that after paying the creditors named the remainder of the assigned estate shall be restored to assignor, hinders and delays the unpreferred creditors and is void as against them, and this although no fraud was intended by assignor or assignee. An assignment void on its face cannot be reformed or validated by a supplementary assignment so as to cut off a lien of a judgment recovered after its execution and before its reformation, or attempted correction. *Sutherland v. Bradner*, 116 N. Y. 410. When a chattel mortgage executed by a debtor to one of his creditors and a transfer of business accounts to a third person do not cover all debtor's property and are only intended to secure payment of debts of the mortgagee and certain other creditors named therein, they are not within the statute regulating the making of general assignments for benefit of creditors and prohibiting preferences. *Delancy v. Valentine*, 154 N. Y. 692, citing and following *Tompkins v. Hunter*, 149 N. Y. 117, distinguishing *Barney v. Griffin*, 2 N. Y. 365; *Collomb v. Caldwell*, 16 N. Y. 484; *Sutherland v. Bradner*, 116 N. Y. 410.

The statute interferes only with the extent of the debtor's right to preferences, not with the method of exercising that right. The words *pro rata* apply when there is not enough of the one-third to pay all the claims of certain class, and not to the rights of several classes. *Matter of Eaton*, 59 Hun, 84, 35 St. Rep. 497, affirmed on opinion below, 126 N. Y. 655, 13 Supp. 135. Where the one-third applicable to preferred debts is not sufficient to pay the creditors of the first class, they take the whole, although other preferred

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creditors take nothing. *Matter of Sisson*, 59 Hun, 330, 36 St. Rep. 290, 12 Supp. 820.

Where an assignment directed the assignee to pay, 1st, the costs and expenses of the assignment; 2d, certain preferred claims; 3d, to pay another, preferred creditor, etc., *held*, that preferences were indicated and must be paid in that order. *Matter of Eaton*, 59 Hun, 84, 35 St. Rep. 497, 13 Supp. 135, affirmed on opinion below, 126 N. Y. 655. Claims for taxes presented by the receiver of taxes are to be treated the same as other claims in the absence of preference thereof by the assignor. *Matter of Defreese*, 26 Supp. 866.

Where an insolvent debtor, in contemplation of making a general assignment for the benefit of creditors, transfers the greater part of his property to certain creditors for the purpose of evading the provisions limiting the amount of preferences, a creditor who, although knowing that the debtor was insolvent, has accepted his preferential payment in ignorance of such guilty intent on the part of the assignor, cannot be charged with the amount thus received by him. *Shotwell v. Dixon*, 22 App. 258, 48 Supp. 984, 82 St. Rep. 984. An assignment for the benefit of creditors made by a married woman having a separate estate and engaged in a separate business is not fraudulent and void as to other creditors because it contains a preference to her husband for salary agreed to be paid him by the wife for his service as agent in managing the business. *Third Nat. Bank of Buffalo v. Gunther*, 123 N. Y. 568, distinguishing *Coleman v. Burr*, 93 N. Y. 17.

A general assignment is not void because of having left out preferences required by statute, but the statute and the assignment are to be construed together. *Matter of Fitzgerald*, 21 Misc. 226, 47 Supp. 630.

The provisions of Laws 1887, chap. 503, declaring that preferences shall not be valid except to the amount of one-third of the assigned estate, does not prevent a debtor from transferring all his property to a single creditor to pay a *bona fide* debt, because such transfer is not a general assignment. *Tompkins v. First Nat'l Bk.*, 18 Supp. 234.

An assignment which makes excessive preferences is valid except as to the excess, and gives no ground for an attachment against the assigning debtor's property. *Rose v. Renton*, 37 St. Rep. 684, 13 Supp. 592. A provision in an assignment that the assignee shall

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discharge and pay in full all debts due or to become due for goods sold to the party of the first part in his business, the particular items of which the party of the first part is now unable to mention, is not so indefinite in identifying preferred creditors as to invalidate the assignment. *Maack v. Maack*, 2 Supp. 506.

An employee to whom the assignee has given promissory notes for wages to be earned by future services is not entitled to a preference under Laws 1886, chap. 283, giving preferences to wages or salaries actually owing to the employees of the assignee at the time of the assignment. *In re Hooper's Estate*, 11 Supp. 242. The restrictions as to preferences of the act of 1887 restrict only the quantity of the estate which may be applied, and the provision that in case of insufficiency to pay the preferred claims in full, they shall be applied on said claims *pro rata*, refers only to cases where the preferred creditors belong to the same class, and are clearly preferred; therefore a debtor may direct the application of one-third of the net proceeds toward the claim of one preferred creditor, before they can be applied to the payment of the second preferred creditor. *Matter of Boyd*, 35 St. Rep. 38.

Co-partners, as successors to another firm, assumed a debt due from that firm to one J., and gave H., the retiring partner, a note for the amount of the debt due to J.; afterwards the new firm made an assignment in which the note given to H. was preferred, and the inventory specified the debt preferred to be on the note held by J. *Held*, such preference was not fraudulent, being to secure the debt due to J. *Smith v. Smith*, 14 Supp. 461.

A preference in an assignment for the benefit of creditors, either in the assignment itself or by separate instrument, which may be construed as part of the assignment, if it exceed in amount one-third of the assets of the assignor's estate, after making the deductions mentioned in the statute, does not make the assignment void, but only has the effect of reducing the preference, if in excess. *Central Nat'l Bk. v. Seligman*, 53 St. Rep. 15.

ARTICLE IV.

JURISDICTION OF COURTS. § 25; Chap. 380, Laws of 1885.

§ 25. Jurisdiction of courts.

Any proceeding under this act shall be deemed for all purposes, including review by appeal or otherwise, to be a proceeding had in the court as a court of general

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jurisdiction, and the court shall have full jurisdiction to do all and every act relating to the assigned estate, the assignees, assignors, and creditors; and jurisdiction shall be presumed in support of the orders and decrees therein, unless the contrary is shown; and after the filing or recording of an assignment under this act, the court may exercise the powers of a court of equity in reference to the trust and any matters involved therein.

L. 1877, ch. 466, § 25.

This section does not enlarge the scope of the jurisdiction of the county court, but merely to give it general jurisdiction in assignment matters. It has not jurisdiction to order the assignee of a banking firm to pay over proceeds of a draft deposited by a creditor on the ground that it was so deposited for a special purpose. The remedy in such case is by action. *Matter of Witmer*, 40 Hun, 64. The power of the court under this section authorizes an order making a new distribution in case of error, and one who has received a distributive share in excess of his proportion of the fund may be compelled to repay the amount thus overpaid for distribution to those entitled. *In re Morgan*, 21 Week. Dig. 341. The court exercises equity powers under this section. *Matter of Bonner*, 8 Daly, 75. While the assignee is not an officer of the court, he is subject, in all matters relating to the assigned estate, to the order and direction of the court, or a judge thereof. *Matter of Mumford*, 5 St. Rep. 303. It is said, in *Matter of Manahan*, 10 Daly, 39, that the court is not authorized to grant allowances from the assigned estate to creditors who proceed against the assignee.

See, also, § 26, Art. XIII., sub. 2.

The following enactment, being chapter 380, Laws of 1885, confers powers and duties relating to general assignments on the Supreme Court :

All powers, rights, duties conferred upon county courts and county judges by chapter four hundred and sixty-six of the Laws of eighteen hundred and seventy-seven, entitled "An act in relation to assignments of the estates of debtors for the benefit of creditors," and by acts amendatory thereof and additional or supplemental thereto, are hereby also conferred upon and shall be exercised by the Supreme Court and the justices of the Supreme Court of the State of New York concurrently with county courts and county judges. All applications under said acts made in the Supreme Court shall be made to the court, or a justice thereof, within the judicial district where the assignment is recorded, and all proceedings and hearings under said acts had in the Supreme Court upon the return of a citation shall be had at a Special Term of said court held in the county where the judgment debtor resided at the time of the assignment; or in case of an assignment by co-partners, in the county where the principal place of business of such co-partners was at the time of the assignment.

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The court acts in these matters as a court of general jurisdiction in respect to the assigned estate and any matters involved therein. It has all the power of a court of equity therein with reference to the management and control of the funds ; its power may be invoked by petition. *Matter of Bonner*, 8 Daly, 75 ; *Matter of Nicholas*, 15 Hun, 317. But the court has no power on the petition of a party claiming property in the possession of the assignee to determine the rights of the claimants. *Matter of Potter*, 44 Hun, 197.

Where an assignee has by mistake paid over to a creditor a portion of the proceeds of the assigned property, to which, in fact, a preferred creditor was entitled, the court has power under the General Assignment Act, on petition of the creditor entitled thereto, on notice to the one claiming it, to order the latter to turn the money over to the assignee to be by him paid out as the assignment directed. *Matter of Morgan*, 99 N. Y. 145.

In the *Matter of Underhill*, 117 N. Y. 471, Peckham, J., commenting upon the latter case, says : " That it was decided upon the very broad and general nature of the jurisdiction granted in the General Assignment Act ; that the court by virtue of that act and in relation to the subject-matter was a court of general jurisdiction to do all and every act relating to the estates of assignees, assignors, and creditors, and after the filing of the record of assignment was to exercise the power of a court of equity in reference to the trust and any matters involved therein. He adds that the point was regarded as one of difficulty, notwithstanding the generality of the language.

The authority given the court in these proceedings, however, is not to be regarded as exclusive. An action for an accounting may be brought in a court of equity jurisdiction. *Hurth v. Bower*, 30 Hun, 151 ; *Converseville Co. v. Chambresburgh Woolen Co.*, 14 Hun, 609 ; *Schuchle v. Reiman*, 86 N. Y. 270. The court has power, although the estate has nearly all been paid out under a decree to the creditors upon a final accounting, to amend the decree so as to allow any creditors to present claims who were not cited upon the final accounting ; and the assignee should be required to render an accounting and to order the creditors paid to return a portion of the funds received by them so as to allow the latter creditors to share in the fund and receive their just portion. *Matter of Wiltsie & Fromer*, 5 Misc. 150, 25 Supp. 733.

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No power is conferred upon the court by § 20 of the General Assignment Act to determine on a final accounting that a compounding creditor has released the assignor from all liability on his debts, and an adjudication to that effect in such a proceeding is void. *Halstead v. Ives*, 73 Hun, 56, 57 St. Rep. 125, 25 Supp. 1058.

ARTICLE V.

INVENTORY. § 3, part of § 6.

§ 3. Inventory or schedule; when and how to be made by debtor or assignee, or on failure of assignee; inspection of books.

A debtor making an assignment shall, at the date thereof or within twenty days thereafter, cause to be made and delivered to the county judge of the county where such assignment is recorded, an inventory or schedule containing :

1. The name, occupation, place of residence, and place of business of such debtor.
2. The name and place of residence of the assignee.
3. A full and true account of all the creditors of such debtor, stating the last known place of residence of each, the sum owing to each, with the true cause and consideration thereof, and a full statement of any existing security for the payment of the same.
4. A full and true inventory of all such debtor's estate at the date of such assignment, both real and personal, in law and in equity, with the incumbrances existing thereon, and of all vouchers and securities relating thereto, and the nominal as well as actual value of the same, according to the best knowledge of such debtor.
5. An affidavit made by such debtor that the same is in all respects just and true. But in case such debtor shall omit, neglect, or refuse to make and deliver such inventory or schedule within the twenty days required, the assignee named in such assignment shall, within thirty days after the date thereof, cause to be made and delivered to the county judge of the county where such assignment is recorded, such inventory or schedule as above required, in so far as he can, and for such purpose said county judge shall at any time, upon the application of such assignee, compel by order such delinquent debtor, and any other person to appear before him and disclose upon oath any knowledge or information he may possess necessary to the proper making of such inventory or schedule. The assignee shall verify the inventory and schedule so made by him, to the effect that the same is in all respects just and true to the best of his knowledge and belief. But in case the said assignee shall be unable to make and file such inventory or schedule within said thirty days, the county judge may, upon application upon oath, showing such inability, allow him such further time as shall be necessary, not exceeding sixty days. If the assignee fail to make and file such inventory or schedule within said thirty days, or such further time as may be allowed, the county judge shall require by order the assignee forthwith to appear before him and show cause why he should not be removed. Any person interested in the trust estate may apply for such order and demand such removal. The books and papers of such delinquent debtor shall at all times be subject to the inspection and examination of any creditor. The county judge is authorized by order to require such debtor or assignee to allow such inspection or examination. Disobedience to such order is hereby declared to be a contempt, and obedience to such order may be enforced by attachment.

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The inventory or schedule shall be filed by said county judge in the office of the clerk of said county in which said assignment is recorded.

L. 1877, ch. 466. (See last clause 36.)

§ 3, as amended L. 1878, ch. 318, § 1.

§ 6. Correction, etc., of schedules.

* * * The county judge shall have power, by order, to require or allow any inventory, or schedule filed to be corrected, or amended, and also to require and compel, from time to time, supplemental inventories or schedules, to be made and filed within such time as he shall prescribe, and to enforce obedience to such orders by attachment.

L. 1877, ch. 466, § 6, as amended L. 1878, ch. 318, § 6.

The assignor may assign everything which under the law is assignable; the test has been stated to be that anything which would pass to the personal representative of a deceased person may pass to a general assignee, and a cause of action for any wrong which would thus survive may be assigned. *Zabriskie v. Smith*, 13 N. Y. 322; *Hyslop v. Randall*, 4 Duer, 660; *McKee v. Judd*, 12 N. Y. 622; *Sherman v. Elder*, 24 id. 381; *Richtmeyer v. Remsen*, 38 id. 206; *Whitaker v. Merrill*, 30 Barb. 389; *Merrill v. Grennell*, id. 594; *Jackson v. Losee*, 4 Sandf. Ch. 381; *Pulver v. Harris*, 52 N. Y. 73; *Brooks v. Hanford*, 15 Abb. 342; *McQueen v. Babcock*, 41 Barb. 337. Real estate passes to the assignee subject to incumbrances and personal property subject to levy or lien. *Warren v. Fenn*, 28 Barb. 333; *Mumper v. Rushmore*, 79 N. Y. 19; *Main v. Green*, 32 Barb. 448; *Van Dine v. Willett*, 38 id. 319. Personal property of all kinds and choses in action pass under the assignment. *Coffin v. McLean*, 80 N. Y. 560; *Millikin v. Dart*, 26 Hun, 24. Hence all property should be included in schedule. But it all passes whether scheduled or not, though the omission to schedule may be evidence of fraud. But a mere omission, unless with fraudulent intent, will not avoid the assignment. *Mathison v. Demarest*, 4 Robt. 161; *Platt v. Lott*, 17 N. Y. 478; *Turner v. Jaycox*, 40 id. 471. When prepared by the assignor, the inventory and schedules are regarded as part of the assignment. *Terry v. Butler*, 43 Barb. 395; *De Camp v. Marshall*, 2 Abb. (N. S.) 373. Failure to file the schedules and inventory does not affect the validity of the assignment. *Produce Bank v. Morton*, 67 N. Y. 199; *Warren v. Jaffray*, 96 id. 248. But the debtors must all verify the schedules. *Cook v. Kelly*, 14 Abb. 466. It is held in *Pratt v. Stevens*, 94 N. Y. 387, that, in the absence of the county judge, the inventory may be filed with the clerk, that the schedules need not include securities known to be fraudulent,

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and that an affidavit to "deponent's best knowledge, information, and belief" was sufficient. It is said that the affidavit attached to inventory on a general assignment, if made by the assignor, must be absolutely that such inventory is in all respects just and true, no other is sufficient to render the assignment valid. *Pratt v. Stevens*, 26 Hun, 229, but this is reversed, 94 N. Y. 387.

The assignor's schedule, though made after assignment, is effectual to validate a mortgage which otherwise might have been invalidated for usury. *Matter of Thompson*, 30 Hun, 195; *Pratt v. Adams*, 7 Paige, 615; *Chafin v. Thompson*, 89 N. Y. 220. The inventory of debts need not, in addition to specification of time of payment, dates, payees, etc., of promissory notes, state what they were given for. Only valid securities need to be stated in the inventory, and if the assignor knows a security to be fraudulent, he is not bound to state it. In the absence of the county judge from the office, the inventory may be delivered to his clerk at his office, and a delivery to a county judge of another county, holding court in the county where the assignment is made at the time, is sufficient compliance with the statute. *Pratt v. Stevens*, 94 N. Y. 387, reversing 26 Hun, 229. An assignment of all the property mentioned in schedule B, to pay debts mentioned in schedule A, and referring to the schedules as annexed, though not so annexed in fact, and not recorded in the county clerk's office with the assignment, is valid, as neither of the schedules was a part of the assignment. *Burghard v. Sondheim*, 50 N. Y. Super. 116. A judgment in favor of the assignee will pass by the assignment, although not named in the inventory, and no knowledge of its existence comes to the assignee. *Emigrant Industrial Savings Bank v. Roche*, 93 N. Y. 374. Intentional omission from schedules raises presumption of fraud. Abb. Dig. 1885, Assignments, p. 26, citing 85 N. Y. 464. When the inventory of an insolvent debtor contained the names of the creditors, with their residences, and the amount of debts owing, and then a brief and very general statement of what the debts were created for, it was held that it complied with the requirements of the statute, and was sufficient to include the cause and consideration of the indebtedness, and the nature of the several debts. *Eastern National Bank v. Hulshizer*, 2 St. Rep. 93. Where schedules are made up by the assignee, they cannot be regarded as characterizing the intent of the assignor in mak-

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ing the assignment. *Denton v. Merrill*, 43 Hun, 224. Otherwise when made by the assignor. *Terry v. Butler*, 43 Barb. 395.

The schedules should, if possible, be verified by the assignor, since he must necessarily be much better acquainted with his assets and liabilities than the assignee can possibly become within the period allowed for filing the inventory by the statute.

It is not the usual practice in the county courts to require the affidavits of disinterested experts to the value of the assets inventoried as is required by rule 8 of the Common Pleas, yet in case of doubt as to the fairness of the inventory, an order for such examination would doubtless be granted on a proper showing to the court by affidavit or petition. (See Rules of Supreme Court, page 279.) A reference to the rules and practice in the Common Pleas will be found desirable even by practitioners in the county courts, since the statute leaves very many of the details of the practice unsettled, and these rules are the only formulated practice, and in the absence of other regulations are recognized by the courts as a safe guide in administering insolvent estates under general assignment.

Under subdivision 5 of § 3 of the General Assignment Act, creditors are entitled, as of right, to an inspection of the assignor's books, and such right cannot be limited to matters concerning the assignment itself, but such inspection may be allowed to enable him to seek for proof to establish a cause of action against a special partner, and to charge him as a general partner. *Matter of Meyer*, 29 App. Div. 394, 51 N. Y. Supp. 1054, 85 St. Rep. 1054.

Under the provisions of the present statute the decisions to the effect that an assignment is void unless an inventory is filed within a certain time have become obsolete, the statute requiring that in such a case the assignee shall be liable to be brought before the county judge to show cause why he should not be removed. The application for this order may be made by any one interested in the estate. The inventory or schedule required by the General Assignment Act, to be made and filed by the debtor making the assignment, is to be read in connection with the assignment as part of the transaction. *Roberts & Co. v. Victor*, 130 N. Y. 585.

Under the statute as it now stands the assignment is good al-

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though no inventory has ever been filed. If one has been filed the county judge has power by order to permit it to be corrected and amended, for it is not an integral part of the assignment. But an invalid assignment cannot be made good by the inventory. The fact that an item attached to an assignment for the benefit of creditors does not state the exact amount of a preferred debt or the precise dates upon which interest is to be reckoned does not of itself invalidate the assignment. *Roberts & Co. v. Buckley*, 80 Hun, 58, affirmed, 145 N. Y. 215, 64 St. Rep. 600.

The omission of assets from the schedule prepared by the assignor is regarded as evidence of fraudulent intent on the part of the assignor in making the assignment. *Tolcott v. Hess*, 4 St. Rep. 62; *Phillips v. Tucker*, 14 St. Rep. 120; *Pittsfield Nat. Bank v. Taler*, 60 Hun, 130. Although it may be shown by way of explanation that the item omitted has no value or that it was the result of accident or inadvertence. *Ellis v. Myers*, 28 St. Rep. 120; *Shultz v. Hoagland*, 85 N. Y. 464; *Cutter v. Hume*, 43 St. Rep. 242. The act of the assignee, however, in preparing the assignment cannot affect its validity. *Denton v. Merril*, 43 Hun, 224, 5 St. Rep. 387. Errors which arise from honest mistake do not affect the validity of the assignment. *McNancy v. Hall*, 86 Hun, 415.

The assignee has a right in the absence of knowledge to the contrary to assume that the inventory and schedule filed by the assignor are correct. In *Matter of Cornell*, 110 N. Y. 351. The fact that an item was omitted from the assignor's schedule is not sufficient to justify a finding that the schedule was falsely made with the object of coercing the creditors into a settlement, where there is positive testimony that the omission was unintentional and by mistake. *Van Berger v. Lehmaier*, 73 Hun, 304, 55 St. Rep. 532, 25 Supp. 356.

A direction to pay out a greater amount than is due will not invalidate the assignment in the absence of fraudulent intent. The fact that a debt is magnified in the inventory does not make it fictitious, unless it was so at the time of making the assignment. *Roberts v. Buckley*, 80 Hun, 58, 61 St. Rep. 561, 29 Supp. 873, affirmed, 145 N. Y. 215, 64 St. Rep. 600.

Fraud by one partner in the interest of the other in the making of the schedule of liabilities, where they permitted him to have entire charge of the business, and the making of the assignment

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and schedules as he directed, is sufficient to invalidate the assignment. *Malkemesius v. Pauly*, 17 Misc. 621, 40 Supp. 936.

Refusal to vacate an order extending the time for an assignee to file his inventory and schedule is proper where the moving papers do not show that the applicant has any interest in the estate. *In re United Press*, 46 Supp. 840.

An attorney who has loaned money to the assignor upon security, for himself and for his clients, may be compelled to testify, in order to enable the assignee to make an inventory. *Matter of Merriam*, 27 App. Div. 112, 50 Supp. 114, 84 St. Rep. 114.

An assignment is valid although no inventory has ever been filed by the assignee, and, if filed, a county judge has power, by order, to require or allow it to be corrected or amended. The inventory is not, therefore, an integral part of the assignment, and an invalid assignment cannot be made good by an inventory; nor does the fact that an item of the schedule does not state the exact amount of the preferred debt, or the precise dates from which interest is to be reckoned thereon, invalidate the assignment. *Roberts v. Buckley*, 80 Hun, 58, affirmed, 145 N. Y. 215.

The inventory will usually require additional schedules to those given in the following precedent, which may readily be added :

Schedules and Inventory connected with the General Assignment of Rudolph Akin.

The name of the assignor, or debtor, is Rudolph Akin, his occupation is a farmer, his place of residence and place of business is in the town of Ulster, Ulster County, State of New York. The name of the assignee is James H. Everett, and his place of residence is in the city of Kingston, said county of Ulster :

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A full and true inventory of all the estate of Rudolph Akin, on the 3d day of July, 1885, the date of the assignment of the said Rudolph Akin, both real and personal, in law and in equity, and the incumbrances existing thereon, and of all the vouchers and securities relating thereto, and the nominal as well as the actual value of such estate, according to the best knowledge of said assignor.

ASSETS.	Nominal value.	Actual value.	Cause of difference.	Incumbrances.
Lots Nos. 564 and 565 on map of property of Jonathan Hasbrouck, in the village of Newburgh, made by Chauncey Gidney, and bounded south by Washington Street north by Scotia alley, and being 50 feet front and rear, and 100 feet deep	\$10,000	\$10,000	.....	No incumbrance.
City lot in said city of Newburgh, bounded north by Fourth Street, east by N. Y. & W. S. R. R. Co., south by Charles H. Dougherty, and west by Water Street.....	35,000	35,000	.....	Incumbered by a mortgage held by John De Graff, for \$25,500, and interest from Feb. 1, 1885. Mortgage resides in New York City. Mortgage for borrowed money.
Stock of goods in store in town of Ulster, as per schedule thereto annexed.....	Incumbrance to be deducted.	Incumbrance to be deducted.		
Note of John D. Wilson, dated May 7, 1882.....	\$6,000	Nothing	Depreciation.	
Note of Charles Gorman, dated April 12, 1874.....	820	\$2,500	Maker worthless.	
Chattel mortgage on personal property of Henry Smith.....	312	Nothing.....	Maker worthless.	
Real estate mortgage made by E. B. Nelson, May 3, 1879.....	150	75	Depreciation.	
.....	1,600	Nothing.....	Second mortgage and property foreclosed.	
Note C. D. Wells, dated May 16, 1883.....	100	Nothing.....	Maker worthless.	
Accounts on books as per schedule annexed.....	1,200	250	Parties worthless.	
Fixtures in and about store.....	200	100	Depreciation.	
Household furniture.....	500	300	Depreciation.	

Art. 5. Inventory.

A full and true account of all the creditors of Rudolph Akin, with the last known place of residence of each, the sum owing to each of them by the said Rudolph Akin, with the true cause and consideration therefor, and a full statement of any existing security for the payment of the same.

CREDITORS.	Last known place of residence.	Amount.	The true cause and consideration therefor.	Statement of any existing security for the payment of same.
Caroline F. Smith.....	Vineland, N. J.....	\$2,000	Money borrowed in erecting store at Newburgh. Debt incurred at Kingston.....	Margaret D. Akin is a joint maker with Rudolph Akin of the note which represents said debts, but the debt is for Rudolph Akin only to pay.
The National Bank of Newburgh.....	Newburgh, N. Y..	1,500	Money advanced by said bank in discounting note of Rudolph Akin, due July 27, 1885. Debt incurred at Newburgh.....	Peck, Van Dalfsen & Co., of Newburgh, are accommodation indorsers on said note.
The National Bank of Newburgh.....	Newburgh, N. Y..	2,121	Money advanced as above on note of Rudolph Akin, due July 25, 1885. Debt incurred at Newburgh.....	D. M. Sellig, of Newburgh, an accommodation indorser on said note.
Peck, Van Dalfsen & Co.....	Newburgh, N. Y..	2,500	Note of Rudolph Akin indorsed by owners and discounted at bank; taken up by holders, and due June 27, 1885. Debt incurred at Newburgh.....	
Quassaic National Bank.....	Newburgh, N. Y..	600	Money advanced on discount of note of Rudolph Akin, due Sept. 5, 1885, by said bank. Debt incurred at Newburgh.....	Note indorsed by Peck, Van Dalfsen & Co., as accommodation indorsers.
Henry G. Wells.....	New York.....	4,000	Goods sold.....	None.
Martin Hotaling.....	Poughkeepsie.....	1,878	Goods sold.....	None.
Merritt & Co.....	Kingston.....	1,217	Goods sold.....	None.
Van Hensen & Co.....	Newburgh.....	1,413	Goods sold.....	None.
Lewis Le Graff.....	New York.....	1,132	Goods sold.....	None.
Harris P. Martin.....	Newburgh.....	148	Goods sold.....	None.
Wells, Harcourt & Co.....	Milton.....	482	Goods sold.....	None.
John Hanford.....	Philadelphia.....	108	Money loaned.....	None.
Charles Spafford.....	Poughkeepsie.....	2,500	Money loaned.....	None.
Henry Hart & Co.....	Meriden, Conn.....	273	Money loaned.....	None.
Cornelius Moon.....	Marlborough.....	3,180	Note indorsed and paid.....	None.
Julius N. Scott.....	Newburgh.....	130	Note indorsed and paid.....	None.

Art. 6. Bond of Assignee and Further Security.

RECAPITULATION.

Debts and liabilities amount to.....	\$20,461 00
Assets nominally worth.....	25,880 00
Assets actually worth.....	14,500 00

In the Matter of the Assignment of Cornelius
Martin to James H. Everett for the benefit of
creditors.

ULSTER COUNTY, ss. :

Cornelius Martin, being sworn, says that he is the assignor named in the above assignment, which bears date the 14th day of July, 1885, recorded in the office of the clerk of the county of Ulster the 15th day of July, 1885; that the inventory and schedules hereto annexed contain a true and full account of all the creditors of said deponent, the last known place of residence of each creditor, where the same is known to the deponent, and, where the same is not known, the fact is so stated therein. Also, the sum owing to each creditor, and the nature of each debt or demand, whether arising on written security, account, or otherwise. Also, the true cause and consideration of such indebtedness in each case. Also, a statement of any existing security for the payment of any such debts. Also, a full and true inventory of all the estate, both real and personal, in law and equity, of Cornelius Martin, at the date of said assignment, and the incumbrances existing thereon, and of all vouchers and securities relating thereto, and the value of such estate according to the best knowledge of deponent. And deponent further says, that the annexed inventory and schedule are in all respects just and true, according to the best knowledge, information, and belief of this deponent.

(*Jurat.*)

(Signature.)

ARTICLE VI.

BOND OF ASSIGNEE AND FURTHER SECURITY. §§ 5, 7, 8, 9.

§ 5. Bond of assignee.

The assignee named in any such assignment shall, within thirty days after the date thereof and before he shall have any power or authority to sell, dispose of, or convert to the purposes of the trust any of the assigned property, enter into a bond to the people of the State of New York in an amount to be ordered and directed by the county judge of the county where such assignment is recorded, with sufficient sureties to be approved of by such judge, and conditioned for the faithful discharge of the duties of such assignee and for the due accounting for all moneys received by him, which bond shall be filed in the clerk's office of the county where such assignment is recorded, but in case the debtor shall fail to present such inventory within the twenty days required, then the assignee, before the ten days thereafter shall have elapsed, may apply to said county judge by verified petition for leave to file a provisional bond until such time as he may be able to present the schedule or inventory as hereinbefore provided.

L. 1877, ch. 466, § 5.

 Art. 6. Bond of Assignee and Further Security.

§ 7. Further bond.

The county judge may, upon his own motion or upon the application of any party in interest, and on such notice as he may direct to be given to the assignor, assignee, and surety, require further security to be given whenever in his judgment the security afforded by the bond on file is not adequate.

L. 1877, ch. 466, § 7.

§ 8. Neglect to file bond.

A failure to file any bond required by or under this act or the acts hereby amended, within the specified time will not deprive the county judge of his power over the assignee or the trust estate.

L. 1877, ch. 466, § 8.

§ 9. Action on bond ; application of proceeds.

Any action brought upon an assignee's bond may be prosecuted by a party in interest by leave of the court; and all moneys realized thereon shall be applied by direction of the county judge in satisfaction of the debts of the assignor, in the same manner as the same ought to have been applied by such assignee.

L. 1877, ch. 466, § 9.

The assignee takes title to the property on the delivery of the assignment and the filing of the bond is not a condition precedent, and does not affect the validity of the assignment. *Thrasher v. Bently*, 59 N. Y. 649; *Produce Bank v. Morton*, 67 id. 194; *Brennan v. Wilson*, 71 id. 502; *Bostwick v. Bennett*, 74 id. 317; *Matter of Farnam*, 75 id. 187; *Warner v. Jaffray*, 96 id. 248; *Ryan v. Webb*, 39 Hun, 435. But until the bond is filed the assignee cannot execute his trust and cannot convert or convey the property. *Woodworth v. Seymour*, 22 Hun, 245. Re-argument denied, 23 id. 147; *Van Hein v. Elkus*, 8 id. 516; *Brennan v. Wilson*, 71 N. Y. 502. The validity of the assignment is not affected by failure to file a bond; when the assignee, after giving a bond, ratifies his acts in leasing property before filing the bond, they are made valid. *Smith v. Newell*, 32 Hun, 501. The bond in the city of New York must be approved by a judge of the Court of Common Pleas. So held before the act of 1885. *Matter of Robinson*, 10 Daly, 148. Under Laws 1860, chapter 348, § 3, the bond required from an assignee might be either joint, or joint and several. *People v. White*, 28 Hun, 289. The giving of a bond is not a prerequisite to the validity of the assignment, and if the bond when given is void, the assignment is not vitiated. *Thrasher v. Bently*, 1 Abb. N. C. 39; less fully, 59 N. Y. 649; *Ryan v. Webb*, 39 Hun, 435. To the same effect, *Sinclair v. Oakley*, 6 Week. Dig. 513; *Plume, etc., Co. v. Strauss*, 17 Hun, 586; *Worthy v. Benham*, 13 id. 176. But the assignee cannot convey the assigned

 Art. 6. Bond of Assignee and Further Security.

property, and such conveyance is a nullity which may be questioned not only by the assignor's creditors, but by the assignee's successors. *Woodworth v. Seymour*, 22 Hun, 245.

Precedent for Bond.

Know all men by these presents, that we, Amasa Humphrey, James F. Brower, and James S. Winne, all residing in the city of Kingston, are held and firmly bound unto the people of the State of New York in the sum of \$10,000, lawful money of the United States of America, to be paid to the said people; to which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly, by these presents.

Sealed with our seals.

Dated the 31st day of July, 1884; and,

WHEREAS, John F. Williams has made an assignment of his property in trust to the above bounden Amasa Humphrey, for the benefit of his creditors, dated the 10th day of July, 1884, recorded on the 10th day of July, 1884, in the office of the clerk of the county of Ulster:

Now, therefore, the condition of this obligation is such that if the above bounden Amasa Humphrey shall faithfully execute and discharge the duties of such assignee, and duly account for all moneys received by him as such assignee, then this obligation to be void, else to remain in full force and virtue.

Sealed and delivered in the presence of (Signatures.) [L. s.]

(Add justification and acknowledgment.)

Indorsed:—"I hereby approve of the within bond, and of the sufficiency of the sureties therein."

Dated August 1, 1884.

WILLIAM S. KENYON,
County Judge of Ulster County.

The rights and duties of trustees for insolvent debtors, heretofore referred to in connection with insolvent proceedings, seem to be the only guide as to the powers and duties of assignees under the statute, except such rules and regulations as have grown up in connection with the administration of such trusts and as have been sanctioned and approved by the courts. These powers are very general and not limited, except so far as is necessary to protect the property of the insolvent for the benefit of his creditors. Under the provision authorizing suits to be brought by the assignee, it has been held that he can maintain an action for conversion of the debtor's property made before his appointment and against the sheriff for negligence with reference to the assignor's property. *Gillett v. Fairchild*, 4 Den. 80; *Acker v. Witherell*, 4 Hill, 112. Under the clause directing a sale of the

Art. 6. Bond of Assignee and Further Security.

property of the assignor, it has been held that the assignee has no discretion even under an order of the court. *Libby v. Rosekrans*, 55 Barb. 202, questioned, 60 N. Y. 93. *Hackley v. Draper*, 4 T. & C. 614. Under the section authorizing the trustee to redeem property of the assignor, it is said that the effect is the same as if redeemed by the debtor himself. *Phyfe v. Riley*, 15 Wend. 248. These provisions relate entirely to the proceedings therein provided for by statute, and are not, perhaps, strictly applicable to general assignments, but are closely analogous. As to general assignments, it is held that the assignee is not a purchaser for value, and the property of the assignor is subject to the same liens and equities in the hands of the assignee as in the hands of the assignor. *In re Howe*, 1 Paige, 125; *Addison v. Bruckmyer*, 4 Sandf. Ch. 531; *Corning v. White*, 2 Paige, 367; *Schieffelin v. Hawkins*, 14 Abb. 112; *Marine Bank v. Jauncey*, 1 Barb. 486; *Reed v. Sands*, 37 id. 185; *Warren v. Fenn*, 28 id. 333; *Leger v. Bonaffe*, 2 id. 475; *Haggerty v. Palmer*, 6 Johns. Ch. 437; *Van Heusen v. Radcliff*, 17 N. Y. 580; *Rust v. Lathrop*, 32 id. 535; *Blydenburgh v. Thayer*, 3 Keyes, 293; *Slade v. Van Vechten*, 11 Paige, 21. The assignee is bound to manage the trust property committed to his care with prudence and diligence. *Jacobs v. Allen*, 18 Barb. 549; *Litchfield v. White*, 7 N. Y. 438; *Matter of Edwards*, 10 Daly, 68; *Matter of Dean*, 86 N. Y. 398; *Higgins v. Whitron*, 20 Barb. 141. He is bound by the terms of the deed from which he derives his authority, and is limited to the powers conferred therein and by law. *Pratt v. Adams*, 7 Paige, 615; *Matter of Davis*, 1 How. (N. S.) 79; *Green v. Morse*, 4 Barb. 332; *Chapin v. Thompson*, 89 N. Y. 270; *Matter of Lewis*, 81 id. 421. He has power under the statute of 1858 to bring suit to set aside a fraudulent transfer by his assignor as a judgment creditor after execution unsatisfied. *Ball v. Slafter*, 26 Hun, 353. In the following cases some of the limitations of his powers are defined: *Small v. Ludlow*, 1 Hilt. 189; *Matter of Adams*, 15 Abb. N. C. 61; *Ridgley v. Johnson*, 11 Barb. 527; *Brennan v. Wilson*, 71 N. Y. 502; *Moir v. Brown*, 14 Barb. 39; *Jones v. Hausman*, 10 Bosw. 168; *Dennistoun v. Hubbell*, id. 155; *Carter v. Hammett*, 12 Barb. 253. He has power to employ persons to assist him in the performance of his duties. *Mann v. Whitbeck*, 17 Barb. 388; *Van Dine v. Willett*, 38 id. 319. He may employ the same clerks the assignor had in his employ. *Parker v. Jervis*, 3 Abb. Dig. 449.

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But as to the manner of conducting the business, see *Carman v. Kelly*, 5 Hun, 283. But he cannot give full power to another to act as he himself might do as to the assigned estate. *Small v. Ludlow*, 1 Hilt. 189. In *Nichols v. McEwen*, 19 N. Y. 27, the general character of the trust is discussed, and this case is cited and commented upon in *Matter of Levy's Accounting*, 1 Abb. N. C. 177. Where assignee made payment by mistake, he can compel the person receiving the money to pay it back. *Matter of Morgan*, 99 N. Y. 145. Where the assignors collected a draft after the assignee had as a creditor released his debts, and turned over the assets of the estate to the assignor, the assignee still retains the right to sue to recover the proceeds of the draft. *Stanford v. Lockwood*, 95 N. Y. 382, reversing 16 Week. Dig. 312. They have not, like executors, the power to act separately, but must all act together in case of joint assignees for the purpose of bringing suit, conveying property, or compromising claims. *Brinkerhoff v. Wemple*, 1 Wend. 470; *Thatcher v. Condee*, 4 Abb. Dec. 387; *Sinclair v. Jackson*, 8 Cow. 544; *Ridgley v. Johnson*, 11 Barb. 527; *Brennan v. Wilson*, 4 Abb. N. C. 79; *Anon. v. Gelpcke*, 5 Hun, 245. Even though one become incompetent, the only remedy is removal by the court. *Matter of Wadsworth*, 2 Barb. Ch. 381. But in case of death of one of joint assignees, the trust property vests in the survivor. *Shook v. Shook*, 19 Barb. 653; *Belmont v. O'Brien*, 12 N. Y. 394. An assignee takes the title subject to rights of judgment creditors, and the latter may bring an action to set aside a fraudulent conveyance made by the assignor. *Taft v. Wright*, 2 T. & C. 614, affirmed, 59 N. Y. 656. An assignee must exercise the diligence of a paid agent or provident owner, and is liable for ordinary diligence, or want of such diligence as prudent persons use in their own business. *Matter of Dean*, 13 Week. Dig. 77, Court of Appeals.

The assignee cannot secure a benefit to himself by inducing creditors to accept a percentage and assign to a third person. *Matter of Marquand*, 57 How. 477. An assignee who neglected to collect notes for a long time, and accepted renewals, held chargeable with the amount. *Winn v. Crosby*, 52 How. 174. An assignee for the benefit of creditors may avoid a chattel mortgage which is fraudulent as to creditors. *Ball v. Slafter*, 26 Hun, 353.

The fact that the assignment was signed four days before it was filed and that the assignors in the meantime remained in pos-

Art. 6. Bond of Assignee and Further Security.

session of the assets, and endeavored to effect an arrangement with the creditors, does not of itself invalidate the assignment; nor does a preference attempted by chattel mortgage to a *bona fide* creditor. *Pierce Steam Heating Co. v. Ransom*, 16 App. Div. 258, 44 Supp. 623.

One of the purposes of the inventory is to enable the court to determine upon the amount of the bond to be given. *Von Hein v. Elkhus*, 8 Hun, 516. Until the bond has been filed the assignee cannot make a conveyance of the property assigned. *Woodworth v. Seymour*, 22 Hun, 245; *Brennan v. Willson*, 71 N. Y. 502. Executing and filing the bond does not affect the title to the property assigned inasmuch as that passes to him under the deed of assignment. As to failure to comply with the statute in regard to filing bond, see *Ryan v. Webb*, 39 Hun, 435.

Where the assignee had executed a lease before he gave his bond, it was held that by subsequently recognizing it and receiving rent under it he was estopped. *Smith v. Newell*, 32 Hun, 501. The liability of the bond is for the discharge of the assignee's duties under the assignment, and not for his responsibility for the assigned property in case the assignment is set aside. *People v. Chalmers*, 1 Hun, 683, affirmed, 60 N. Y. 154.

The statute of limitations does not run against an assignor's creditors as to the bond while assets remain unsettled in the hands of the assignee. Nor does the delay of the creditors to require an accounting from the assignee until he has become insolvent relieve the sureties on the bond from liability. *People v. White*, 28 Hun, 289. An order on an accounting against the assignee is presumptive evidence against the sureties, but is subject to rebuttal and explanation. *Bridgeport Ins. Co. v. Wilson*, 34 N. Y. 275; *Thomson v. MacGregor*, 81 N. Y. 592; *People v. White*, 28 Hun, 289.

Section 812 of the Code, as amended by chap. 568 of Laws of 1892, provides a method for the relief of sureties on bond of assignee, etc. Under the provisions of the bond, the sureties contract that "the assignee shall faithfully execute and discharge the duties of such assignee and duly account for all moneys received by him as such assignee." *Held*, that the sureties were liable for the proper administration of the funds which came into the hands of the assignee; that their liability extends not only to the moneys coming into the hands of assignee, but also to the

Art. 7. Advertising for Claims.

making of distribution under the decree of final accounting. It was also held that the obligations of the sureties extended to the portion of the decree directing the payment to plaintiff for services rendered by him, and that § 9 of the Assignment Act does not limit the right of the benefit of the bond exclusively to the original creditors of the assignor. *Van Slyke v. Bush*, 123 N. Y. 47, 33 St. Rep. 65.

The sureties on an assignee's bond are liable only to the extent of the funds that come into the hands of such assignee. *Israel v. Jordan*, 12 Misc. 552, 34 Supp. 21, 67 St. Rep. 888. The inventory of the assignee is *prima facie* evidence of the facts therein set forth. *Pierpoint v. McGuire*, 13 Misc. 70, 34 Supp. 150, 68 St. Rep. 197.

The giving of the bond by the assignee is not a condition precedent to the vesting in him of title to the assigned property. *Kilpatrick v. Dean*, 15 Daly, 182, 4 Supp. 708, affirming 3 Supp. 60. A general assignee may attach property of the trust before he has filed his bond. *Easton v. Durland Riding Academy Co.*, 7 App. Div. 288.

The fact that an assignment was made in fraud of creditors in which the assignee participated does not make the sureties liable for that fraud, nor are the sureties liable for goods taken from the possession of the assignee by creditors upon attachment, the proceeds of which are applied to the payment of their claims and which never came into his hands. *Matter of Hallheimer*, 21 App. Div. 525.

ARTICLE VII.

ADVERTISING FOR CLAIMS. § 4.

§ 4. Advertisement for claims.

The county judge may, upon the petition of the assignee, authorize him to advertise for creditors to present to him their claims, with the vouchers therefor, duly verified, on or before a day to be specified in such advertisement, not less than thirty days from the last publication thereof, which advertisement or notice shall be published in two newspapers, to be designated by the county judge, as most likely to give notice to the persons to be served, not less than once a week for six successive weeks, and if it appears that any of such creditors reside out of the State, then in like manner in the State paper.

L. 1877, ch. 466, § 4.

(Note the fact that the State paper has been abolished. See *Executive Law*, §§ 73, 74.)

The effect of omission by a creditor to present his claim is pre-

Art. 7. Advertising for Claims.

scribed by § 13 of the act, under which he is not entitled to notice of settlement of assignee's account, but in case the assignee is satisfied from the debtor's schedules that the creditor has a valid claim, he is not debarred from sharing in the distribution of the fund in the hands of the assignee, and it is said that this method of giving notice to creditors may be auxiliary to other methods. *Matter of Gilbert*, 9 Daly, 479. In New York City, however, in one instance, a different rule seems to have been adopted as to including claims not presented in distribution of creditors. See *Matter of Burdick*, 10 Daly, 49. The assignee has no discretion to refuse payment of a preferred claim because it is usurious, and a claim within the statute of frauds is valid against the estate. *Green v. Morse*, 4 Barb. 332; *Chapin v. Thompson*, 89 N. Y. 270; *Matter of McCallum*, 10 Daly, 72; *Matter of Ward*, id. 66; *Livermore v. Northrup*, 44 N. Y. 107. But it is held, in *Brown v. Halstead*, 17 Abb. N. C. 197, that the assignee is not required to pay a claim he knows or believes to be wholly fictitious. In *Albert v. Back*, 52 N. Y. Super. 550, affirmed without opinion, 101 N. Y. 656, it was held that where the assignee paid a preferred claim he had every reason to know was fraudulent, and which was afterward declared so, he must be charged with the amount paid. It is said to be otherwise as to usury against a claim not preferred. *Matter of Brown*, 10 Daly, 115. The act by § 26 provides for trial by jury, or before a referee, of any disputed claim arising under the statute. The practice would, doubtless, in such case, be assimilated to that on a reference to try validity of disputed claim out of surrogate's court. Where the assignor fails to advertise, he will become liable for any claims overlooked by him. *Matter of Ludington*, 5 Abb. N. C. 307. The assignee cannot be compelled by a mortgagee to pay taxes where they are not preferred by the assignment. *Matter of Lewis*, 81 N. Y. 421.

Precedent for Petition for Order to Advertise for Claims.

ULSTER COUNTY COURT.

In the Matter of the General Assignment of
Cornelius Martin to James H. Everett.

To Hon. WILLIAM S. KENYON :

The petition of James H. Everett respectfully shows : That on the

 Art. 7. Advertising for Claims.

3d day of July, 1885, Cornelius Martin, then residing and now residing at, and who conducted a farm in, the town of Ulster, county of Ulster and State of New York, made and executed in due form of law a general assignment to your petitioner for the benefit of his creditors, which said assignment was, on the 3d day of July, 1885, duly recorded in the office of the clerk of the county of Ulster, and on the 6th day of July, 1885, in the office of the clerk of the county of Orange.

That your petitioner has accepted said assignment and given the undertaking required by law, and entered upon the discharge of his duties as assignee under said assignment.

That your petitioner is informed from the inventory and schedules filed by said Cornelius Martin, that all of the creditors of the said Cornelius Martin reside in the State of New York, in the counties of Ulster and Orange.

Wherefore your petitioner prays that he may be authorized to advertise for creditors to present to him their claims, with the vouchers therefor, duly verified, in accordance with the statute in such case made and provided.

Dated July 28, 1885.

JAMES H. EVERETT.

(Add verification as to pleading.)

Precedent for Order to Advertise for Claims.

(Caption in usual form.)

(Title.)

On reading and filing the petition of James H. Everett, verified on the 28th day of July, 1885, and on application of S. T. Hull, attorney for said petitioner, it is

Ordered, that the prayer of said petitioner be and the same is hereby granted, and the said James H. Everett is hereby authorized to advertise for creditors of Cornelius Martin to present their claims, with the vouchers therefor, duly verified, on or before a day to be specified in said advertisement, not less than thirty days from the last publication thereof, which said advertisement or notice shall be published once in each week for six successive weeks, in the Kingston Daily Leader, a newspaper published in the city of Kingston, Ulster County, and in the Albany Journal, a newspaper published in the city of Albany, designated for that purpose.

Dated July 28, 1885.

WM. S. KENYON,

County Judge of Ulster County.

Precedent for Notice to Present Claims.

In pursuance of an order made by the Hon. Wm. S. Kenyon, on the 28th day of July, 1886, notice is hereby given to all the creditors and persons having claims against Cornelius Martin, lately doing business in the town and county of Ulster, under the name of Cornelius Martin, that they are required to present their claims, with the vouchers therefor, duly verified, to the subscriber, the duly appointed assignee of the said Cornelius Martin, for the benefit of his

Art. 8. Removal or Death of Assignee.

creditors, at his place of business, No. 123 Washington Avenue, in the city of Kingston, on or before the 10th day of October, 1886.

S. T. HULL,

JAMES H. EVERETT,

Attorney for Assignee.

Assignee.

ARTICLE VIII.

REMOVAL OR DEATH OF ASSIGNEE. §§ 6, 7, 8, 9, and 10.

§ 6. Removal of assignee; appointment of successor; correction, etc., of schedules.

The county judge shall in the case provided in § 3, and may also at any time on the petition of one or more creditors, showing misconduct or incompetency of the assignee, or on petition of the assignee himself, showing sufficient reason therefor, and after due notice of not less than five days to the assignor, assignee, surety, and such other person as such judge may prescribe, remove or discharge the assignee, and appoint one or more in his place, and order an accounting of the assignee so removed or discharged, and may enjoin such assignee from interfering with the assignor's estate, and make provision by order for the safe custody of the same, and enforce obedience to such injunction, and orders by attachment; and, upon his discharge upon his own application, such assignee's bond shall be cancelled and discharged. The new assignee shall give a bond to be approved as above required. The county judge shall have power, by order, to require or allow any inventory or schedule filed to be corrected or amended, and also to require and compel from time to time supplemental inventories or schedules to be made and filed within such time as he shall prescribe, and to enforce obedience to such orders by attachment.

L. 1877, ch. 466, § 6, as amended L. 1878, ch. 318, § 6.

§ 7. Further bond.

The county judge may, upon his own motion, or upon the application of any party in interest, and on such notice as he may direct to be given to the assignor, assignee, and surety, require further security to be given, whenever in his judgment the security afforded by the bond on file is not adequate.

L. 1877, ch. 466, § 6.

§ 8. Neglect to file bond.

A failure to file any bond required by or under this act, or the acts hereby amended within the specified time, will not deprive the county judge of his power over the assignee or the trust estate.

L. 1877, ch. 466, § 8.

§ 9. Action on bond; application of proceeds.

Any action brought upon an assignee's bond may be prosecuted by a party in interest by leave of the court; and all moneys realized thereon shall be applied by direction of the county judge in satisfaction of the debts of the assignor, in the same manner as the same ought to have been applied by such assignee.

L. 1877, ch. 466, § 9.

§ 10. Death of assignee.

In case an assignee shall die during the pendency of any proceeding under this act, or at any time subsequent to the filing of any bond required herein, his personal representative or successor in office, or both, may be brought in and substituted in such proceeding on such notice (of not less than eight days) as the county judge may direct to be given; and any decree made thereafter shall bind the parties thus substituted

 Art. 8. Removal or Death of Assignee.

as well as the property of such deceased assignee; provided, however, that if such assignee die subsequent to the filing of his bond, and before any proceedings may have been had thereunder, then the surety on such bond may apply to the county judge for an accounting, who may, on such terms as to him seems just and proper, appoint another and release such surety.

L. 1877, ch. 466, § 10.

See *Matter of Grove*, 64 Barb. 526.

Misconduct on the part of assignees cannot be cured, and an assignee removed for misconduct in office, no matter to what degree, is not entitled to commission. *Matter of Danzig*, 16 St. Rep. 708, 2 Supp. 161, affirmed without opinion, 110 N. Y. 682.

The Court of Chancery originally had jurisdiction to remove a trustee for cause, and that power then devolved upon the Supreme Court. *People v. Norton*, 9 N. Y. 177; *Wood v. Brown*, 34 id. 337. A breach of his trust of whatever character justifies the removal of the trustee. *Van Epps v. Van Epps*, 9 Paige, 237. Such as mingling the trust funds with his own funds in case it jeopardizes the fund. *Orphan Asylum v. McCartee*, 1 Hopk. 429; *Deen v. Cozzens*, 7 Robt. 178. Or any refusal to properly perform the duties of assignee. *Matter of Mechanics' Bank*, 2 Barb. 446. Or collusion with assignor as against the interest of the creditors. *Manning v. Stern*, 1 Abb. N. C. 409. The failure of the assignee to file his bond is a ground for removal. *Van Hein v. Elkus*, 8 Hun, 516; *Brennan v. Wilson*, 7 Daly, 59; *Barbour v. Everson*, 16 Abb. 366; *Read v. Worthington*, 9 Bosw. 617; *Hardmann v. Bowen*, 39 N. Y. 276. The assignee will not, however, be discharged without an accounting upon notice to the interested parties. *Matter of Dryer*, 10 Daly, 8; *Matter of Yeager*, id. 7; *Matter of Groencke*, id. 17; *Matter of Horsfall*, 5 Abb. N. C. 289; *Matter of Parker*, 10 Daly, 16. It is held, in *Matter of Cohn*, 78 N. Y. 248, that the county court has, under the provisions of this section, full power in the matter of removal of assignee for misconduct and incompetency, as was exercised by a court of equity, and that these two grounds are the only ones upon which an assignee can now be removed under the statute.

It seems that if an assignee in a proper case refuses to proceed and bring in the assigned property, the creditors collectively, or one in behalf of all, may join to compel the execution of the trust in equity, or cause the removal of the assignee, and appointment of another. In either case, however, a decree for a single

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debt would be erroneous. The decree must follow the assignment, and the fruits of a recovery be distributed according to its terms. *Crouse v. Frothingham*, 97 N. Y. 105, reversing 27 Hun, 123, and distinguishing *Bank v. Leggett*, 51 N. Y. 554. Where an application is made to remove an assignee, application should be made to all the assignors within the State, and such notice as the court may direct to any without the State. *Matter of Cohen*, 2 How. (N. S.) 523. In the *Matter of Henlein*, Abb. Dig. 1885, p. 24, an assignee was removed by Van Hoesen, J., for administering the estate in the interest of the assignors. An assignee who pays as fees to his counsel, moneys of the assigned estate, with the understanding that the counsel shall furnish sureties on his bond, and pay what is necessary to procure them, is to all intents and purposes using the assigned estate for the purchase of bondsmen, and should be removed. *Matter of Robinson*, 10 Daly, 148. An assignee who checked out funds of the estate on deposit, and refused to exhibit his check-book to creditors, or explain what use he made of the funds, *held*, guilty of misconduct, which required removal, although no misapplication of the funds was shown. *Matter of Coffin*, 10 Daly, 27. It is not ground for removal that the assignee refused to comply with a request to show all the books in his hands. He may sell the goods at retail if he realizes more than can be obtained otherwise.

That an assignee has disposed of the estate in bulk is not good reason for his removal where it is a fair question whether the price received is not a good one. *Matter of Smith*, 10 Daly, 106. That an assignee is about to pay preferred creditors before maturity while unpreferred creditors threaten an action to set aside an assignment is not good ground for removal. *Matter of Mayer*, 66 How. 106. On petition of creditor an assignee may be removed for fraudulent disposition of assets. *Mulcher v. Abbott*, 1 Law Bull. 54. The power of summary removal conferred on the county judge was intended to be as broad as the exigencies of the case might require and is not less than that possessed by a court of equity. *Matter of Cohen*, 78 N. Y. 248; *Matter of Bailey*, 85 id. 629. An assignee who is also a creditor and who exacts releases as assignee as a condition of signing composition is liable to removal. *Matter of Horsfall*, 5 Abb. N. C. 289.

The provisions of § 1915, Code of Civil Procedure, "Ac-

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tion on a Penal Bond," are applicable to the bond given by a general assignee under an assignment for the benefit of creditors; and in *Matter of Stockbridge*, 10 Daly, 33, it is held that all creditors entitled to prosecute will be allowed, on application to the court, to bring suit on the bond. The recoveries as to amount are of course limited by the penalty of the bond as set out in the section cited.

It would seem that § 8 is to be construed with § 5 preventing the assignee from disposing of the assets of the assignor until the filing of the bond, and with § 6 providing for his removal, under which the decisions hold that failure to file a bond is sufficient ground for such removal.

The assignee may be removed if he fails to collect the assets of assignee's estate at any time after he could easily have done so. Where all that remained to be done after the removal of the assignee was to state his account and distribute the funds, a new assignee need not be appointed. *Tomkins v. Sheehan*, 6 App. Div. 76, 39 Supp. 466. Where the assignee retained an attorney employed by the wife of the assignor, who had claims against the estate, and was guilty of prevarication in the interests of the wife, and made no examination of the assignor's books after notice that certain assets had not been included in the inventory, it was held sufficient to authorize his removal, and that it was proper to refer the matter to a referee to take proof and report his finding thereon. *In re Mellen*, 18 N. Y. Supp. 515.

Chapter 185 of the Laws of 1882 provides that on the death of the trustee of a trust estate the trust estate vests in the Supreme Court; this rule does not apply to the assignments for benefit of creditors. *Matter of Magnus*, 22 Supp. 70, 2 Misc. 347, 50 St. Rep. 599, affirmed in 137 N. Y. 630. It is further held in this case that the personal representatives of a deceased assignee must be substituted in his stead. But in the *Matter of Tousey*, 2 App. Div. 569, 74 St. Rep. 319, it is held that on the death of an assignee the trust does not vest in his personal representatives, but vests in the Supreme Court, which may appoint a substituted assignee, and such assignee need not be the personal representative of the original assignee. As to the procedure on removal of the assignee, see *Matter of Horsfall*, 5 Abb. N. C. 289; *Livingston's Petition*, 2 Abb. Pr. (N. S.) 1; *Matter of Miller*, 15 Abb. Pr. 277; *Matter of Robinson*, 37 N. Y. 261.

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An order of reference to take proof as to charges against an assignee is not a final order, and is not reviewable in the Court of Appeals. *Matter of Friedman*, 82 N. Y. 609. Nor is a final order removing assignee because of incompetency or misconduct in office so reviewable, if there is no evidence to sustain a finding to that effect. *Matter of Bailey*, 85 N. Y. 629. Where there is more than one assignee, in event of the death of one the survivor or survivors are charged with the execution of the trust. *Shook v. Shook*, 19 Barb. 653; *Belmont v. O'Brien*, 12 N. Y. 394; *Brennan v. Willson*, 71 N. Y. 502.

When an assignee for creditors, after having filed his bond and entered upon the discharge of his duties, dies, his executrix is entitled under said § 10 to be made and substituted assignee upon giving a bond duly approved. Chapter 185, Laws of 1887, does not apply to general assignment for benefit of creditors. *Matter of Magnus*, 2 Misc. 347.

Order to Show Cause why Substituted Assignee Should not be Appointed.

At a Special Term of the Supreme Court, held at chambers in the village of Oneonta, N. Y., on the 3d day of March, 1896 :

Present :—Hon. Burr Mattice, *Justice*.

SUPREME COURT—STATE OF NEW YORK.

In the Matter of the General Assignment of George Clark for the Benefit of his Creditors.	}
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On reading and filing the petition of Anna Pell, verified on the 29th day of February, 1896, by which it appears to the satisfaction of this court that the general assignment made by George Clarke, for the benefit of his creditors, on or about the 14th day of April, 1887, to George Barnard as assignee, and filed in the Otsego County clerk's office on or about the 20th day of April, 1887, still remains unexecuted, and the trust thereby created unadministered, and that said George Barnard, the sole assignee, is dead, and that no successor, trustee, or receiver has been appointed in his place and stead to execute the said assignment according to the terms thereof, and that George Clark, the assignor named in said assignment, is dead, and that no previous application has been made for the appointment of a trustee or receiver to be substituted in the place and stead of said George Barnard, deceased ; and that said petition contains the names of all persons interested in the estate of George Clark, as widow, next of kin, heirs at law, creditors, or otherwise that can now be ascertained.

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Now on motion of Lynn J. Arnold, attorney for petitioner, ordered, that the application of the petitioner, Anna Pell, for the appointment of a successor, trustee, or receiver to be substituted in place and stead of said George Barnard, deceased, to execute, administer, and discharge the trust created in and by said assignment according to the terms thereof, be heard at a Special Term of this court, to be held at the court-house in the village of Cooperstown, N. Y., on the 28th day of April, 1896, at the opening of court on that day or as soon thereafter as counsel can be heard.

And it is further ordered, that all persons interested in the estate of George Clarke, as widow, next of kin, heirs at law, creditors, or otherwise, be and they are hereby required to show cause, at the time and place above specified, to this court, why the prayer of the petitioner, Anna Pell, should not be granted.

And it is further ordered, that notice of such application be given by the petitioner serving a copy of this order on Sayles, Searle & Sayles, of Rome, N. Y. (here name parties), and on all the persons named in schedules A and B annexed to the petition herein, by depositing a copy of the same at least thirty days prior to the return day of this order in the postoffice in Cooperstown, N. Y., duly enclosed in a post-paid wrapper and directed to each of the persons above named at their postoffice address placed after their respective names, and to each of the creditors named in schedules A and B, at their postoffice address written after their respective names.

And it is further ordered, that for the purpose of giving notice to the unknown creditors and persons interested in said estate, that the petitioner cause a copy of this order to be published once a week for six successive weeks prior to the return day of this order in three newspapers, to wit: In the Albany Evening Journal, published at Albany, N. Y.; the Utica Daily Herald, published at Utica, N. Y.; and the Otsego Republican, published at Cooperstown, N. Y.

Enter.

BURR MATTICE,

J. S. C.

To all persons interested in the general assignment of GEORGE CLARKE for the benefit of his creditors and in his estate :

Please take notice of an order duly granted in the above-entitled matter, and entered in the Otsego County clerk's office, on the 4th day of March, 1896, of which the foregoing is a copy. Dated March 4th, 1896.

Yours, etc.,

LYNN J. ARNOLD,

Attorney for Petitioner, ANNA PELL.

Office and Postoffice address, Cooperstown, N. Y.

ARTICLE IX.

INTERLOCUTORY PROCEEDINGS. §§ 21 and 23, part of § 26.

§ 21. Examinations at other times; incriminating answers.

The county judge may also at any time, on petition of any party interested, order the examination of witnesses and the production of any books and papers by any party or witness before him, or before a referee appointed by him for such purpose,

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and the evidence so taken together with the books and papers, or extracts therefrom, as the case may be, shall be filed in the county clerk's office, and may be used in evidence by any creditor or assignee in any action or proceeding then pending, or which may hereafter be instituted. No witness or party as above provided shall be excused from answering on the ground that his answer may criminate him, but such answer shall not be used against him in any criminal action or proceeding.

L. 1877, ch. 466, § 21.

§ 23. Sale, compromise, or compounding of claims.

The county judge where the assignment is recorded, may, upon the application of the assignee and for good and sufficient cause shown, and upon such terms as he may direct, authorize the assignee to sell, compromise, or compound any claim or debt belonging to the estate of the debtor. But such authority shall not prevent any party interested in the trust estate from showing upon the final accounting of such assignee that such debt or claim was fraudulently or negligently sold, compounded, or compromised. The sale of any debt or claim heretofore made in good faith by any assignee shall be valid, subject, however, to the approval of the county judge, and the assignee shall be charged with and be liable for, as part of the trust fund, any sum which might or ought to have been collected by him.

L. 1877, ch. 466, § 23, as amended L. 1885, ch. 464.

§ 26. Trial of disputed claims; commissions of assignee.

The court, in its discretion, may order a trial by jury or before a referee, of any disputed claim or matter arising under the provisions of this act, or the acts hereby amended. * * *

L. 1877, ch. 466, § 26, as amended L. 1878, ch. 318, § 7.

Demand and refusal are not necessary in order to entitle petition to be made and order granted under § 21, and the meaning of "party interested" is substantially those entitled to notice on an accounting. *Matter of Bryce*, 10 Daly, 18. But the granting or refusing the order is discretionary with the court or judge. *Matter of Swezey*, 10 Daly, 107. It is the duty of the court or judge to pass on the good faith of the application, but the mere fact that the examination may develop facts sufficient to set aside the assignment as fraudulent is not ground for vacating an order. *Matter of Kapelovich*, 22 Week. Dig. 13. Examination has been granted as to ownership of trade-mark and in reference to title deeds. *Matter of Strauss*, 1 Abb. N. C. 402. But the petition must be verified. *Matter of Brown*, 10 Daly, 115. And in any event the examination can only be granted in aid of the assignment. *Matter of Everett*, 10 Daly, 99. The examination of the assignee should not extend to an inquiry as to whether the preferences are fraudulent, or whether there was legal or actual fraud in making the assignment, or in the anterior transactions. *Matter of Rindskopf*, 16 Abb. N. C. 316; *Schneider v. Altman*, 8 Civ. Pro. 242. The examination is allowed only when in aid

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of the assignment, and is not authorized merely to show that property has been fraudulently withheld or preferences fraudulently given, and thus to avoid and annul the assignment. Whoever avails himself of the provisions of the act elects to join in aid of its purpose, which is to bring in and distribute the assigned property according to the terms of the assignment. The judge granting the order must be satisfied that the proposed examination is in good faith, and that the witnesses to be examined have, or the books or papers to be produced contain, information pertinent thereto. The discretion of the judge as to the examination cannot be confided to the referee, and he cannot delegate to him the power to compel the production of papers, nor can the referee report his opinion on the evidence. *Matter of Holbrook*, 99 N. Y. 539. But an order for an examination of the assignor and assignee on the application of a creditor is proper, although the examination will incidentally furnish evidence in support of an action to set aside the assignment as fraudulent. *Matter of Wilkinson*, 36 Hun, 134. Examination may be had at any time. It is necessarily confined to cases where a proceeding is pending. *Matter of Bryce*, 10 Daly, 18. An examination cannot be had on allegations of facts tending to show fraud by the assignors in conducting the business previous to the assignment; such a proceeding is in hostility to, not in aid of, the assignment. *Matter of Goldsmith*, 10 Daly, 112; S. C. 15 Week. Dig. 110. The examination should not be ordered unless benefit will result to the assigned estate, but it may be ordered for the purpose of aiding in enforcing the assignment and aiding an action by the assignee. *Matter of Burnett*, 8 Daly, 363; *Matter of Sweezy*, 64 How. 353, affirming 62 id. 215; *Matter of Brown*, 10 Daly, 115. An examination, the design of which is to discover evidence which may be used in an action to set aside an assignment as fraudulent, must be had under the Code of Procedure, and cannot be had under the General Assignment Act. *Matter of Rindskopf*, 16 Abb. N. C. 316n. An assignee should allow creditors reasonable opportunity to examine the books of the assignor. *Manning v. Stern*, 1 Abb. N. C. 409. And the court may grant creditors leave to examine the assignor's books by an expert or other person designated by the applicant. *Matter of Isidor*, 59 How. 98; *Matter of Landaur*, 22 Week. Dig. 73. In order that an examination of the books may be granted, facts showing its necessity

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or propriety must be shown. *Matter of Koons*, 11 Week. Dig. 55.

An assignee for the benefit of creditors should not be directed to sell the name of the debtor as a common-law trade-mark, and thus debar the debtor from the use of such name thereafter, particularly where the assignee has already sold a large quantity of labels bearing that name to be used on goods purchased from the assignee, as such sale to a stranger would tend to produce confusion. *Matter of Adams*, 24 Misc. 293, 53 Supp. 666, 87 St. Rep. 666.

It was said in *Anon. v. Galpeke*, 5 Hun, 245, that in case an assignee act in good faith, he may compromise without the order of the court; and where the amount involved is not large, the application may be made without notice or reference. *Matter of Wooster*, 10 Daly, 6. As to this it may again be said that a reference as to compromise is not usual outside the Common Pleas. The court may order notice to be given creditors, and in case of large interests this is obviously the proper course. *Matter of Younge*, 5 Abb. N. C. 346. But a general power, aside from that conferred by the trust deed, will not be granted the assignee to compromise in his discretion. *Matter of Ransom*, 8 Daly, 89.

A refusal of assignee to permit the inspection of books, alleging "that they were not there," but producing no affidavits at the hearing that the books were not in his custody or giving any other reason for refusing; *held*, not to preclude the issuance of an order for inspection. And this is so whether the assignee had or had not filed an inventory within time required by statute. *Matter of Hermann Lumber Company*, 21 App. Div. 514.

Previous to the enactment of this section the court had no power to direct an assignee, in the general administration of his trust. *Matter of Shipman*, 1 Abb. N. C. 406. But the assignee could apply to the Court of Chancery for its advice upon the collection or compromise of a debt, and that court had jurisdiction of the subject-matter. *Matter of Croton Ins. Co.*, 3 Barb. Ch. 642. The act in question gives to the county court authority in that respect which before could only be exercised by a court of equity. It seems to have been the practice in the Court of Common Pleas in New York City to order a reference to take proof of the facts and circumstances upon application for such an order. *Matter of Wooster*, 10 Daly, 6.

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In the *Matter of Wilkinson*, 36 Hun, 134, it was held that an examination should be allowed under the statute where the petition showed there was a reasonable ground for apprehending that the assignor has fraudulently disposed of his assets or that the assignee has fraudulently omitted assets from the inventory, or placed upon the schedule claims which were fraudulent in whole or in part, even if the evidence obtained upon the examination might enable the creditors to attack the assignment.

Precedent for Order to Sell Accounts.

(Title.)

(Caption usual form.)

A citation having been issued herein to all persons interested in the estate assigned by Rudolph Akin to James H. Everett, for the benefit of creditors, dated the 3d day of July, 1885, to attend the settlement of the accounts of the said James H. Everett, as assignee of said estate, which said citation was dated on the 24th day of June, 1886, and was made returnable on the 19th day of July, 1886, and due proof of due service of said citation upon (here recite the services and appearances), and it appearing on the return day of said citation, by the account of the assignee and other proof, that there were a number of accounts of the nominal value of \$1,100, which are of little or no actual value, and which have not been collected after due diligence, and which are wholly or quite uncollectible:

Now, on motion of S. T. Hull, attorney for assignee, he hereby is authorized to sell at public auction, at the front door of the courthouse, in the city of Kingston, the several accounts mentioned in Schedule A, annexed to the account herein, and that he give notice of such sale by publishing a notice thereof daily, at least one week before such sale, in the *Daily Leader*, and by posting hand-bills in at least ten public places in the said city, at least one week before such sale, giving notice thereof.

It is further ordered that these proceedings be, and they hereby are, adjourned to the 3d day of August, 1885, to await the coming in of the report of the said sale of the accounts as aforesaid.

WILLIAM S. KENYON,

County Judge of Ulster County.

Precedent for Petition for Leave to Compromise.

(Title.)

To Hon. WILLIAM S. KENYON, County Judge of Ulster County :

The petition of Abram Barton respectfully shows : That on the 5th day of June, 1884, Hiram Goodwin, residing at Kingston, and who carried on business at Kingston, Ulster County, made and executed, in due form of law, a general assignment to your petitioner for the benefit of his creditors, which said assignment was, on the 6th day of June, 1884, duly recorded in the office of the clerk of the county of Ulster.

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That your petitioner accepted said assignment, and entered upon the execution of said trust.

That among the property so assigned to your petitioner is a certain claim against the firm of Bell, Coons & Co., of the city of Poughkeepsie, amounting as appears by the schedules filed by the said Hiram Goodwin and from his books, to the sum of \$1,800.

That on or about the 14th day of September, 1884, the said firm of Bell, Coons & Co. failed and suspended business, and have proposed to their creditors a settlement of forty cents on the dollar; that your petitioner has examined into the statement and affairs of said firm; that the total liabilities of said Bell, Coons & Co. amount to \$34,000, and their assets, to the best of deponent's knowledge, do not exceed the sum of \$15,000, and that the said proposition of settlement appears to your petitioner to be just and fair.

Dated January 24, 1885.

ABRAM BARTON.

(Add verification.)

Precedent for Order for Leave to Compromise a Debt Due the Estate.

(Title.)

(Caption usual form.)

Upon reading and filing the petition of Abram Barton, verified on the 24th day of January, 1885, now on application of E. D. Brandow, of counsel for said petitioner, and it appearing to be for the interest of the assigned estate, it is ordered that the said Abram Barton be, and he hereby is, authorized to settle and compound the indebtedness of Bell, Coons & Co. upon the receipt of forty per cent. of the said indebtedness.

WILLIAM S. KENYON,

County Judge of Ulster County.

The trial of disputed claims by jury or referee, under § 26, is a trial of an issue of fact, and when had before a referee his determination can only be reviewed on appeal from the judgment or decree. *Matter of Figelstock*, 5 Law Bull. 71. A claim for damages for breach of contract by the assignors, whereby claimant lost profits accruing after the assignment, is not provable as a debt against the estate. *Matter of Adams*, 15 Abb. N. C. 61. It seems under the decision in *Islein v. Henlein*, 16 id. 73, that the assignee may reject a proof of claim on the ground that the claimant had previously taken proceedings in hostility to the assignment. Rule 30 of the General Rules of Practice is held in the Common Pleas to apply to filing of reports of referees on general assignments, and to exceptions to, and confirmation of, such report. *Matter of Schen*, 10 Daly, 11. Upon an application for the discharge of an assignee and his sureties it must appear that creditors have been advertised for, that a citation to attend the accounting has been issued, and that an accounting has been had.

Art. 10. Miscellaneous Matters of Practice.

Matter of Merwin, 10 Daly, 13. The referee must be sworn unless the oath is waived. Section 1016, Code Civil Procedure, applies. *Matter of Vilmar*, 10 Daly, 15. The duty of an assignee is to uphold the trust, not impeach it; he cannot object to the payment of a creditor preferred in the assignment on the ground that the preference is fraudulent. *Matter of Ward*, 10 Daly, 66. A preferred claim must be paid by an assignee for the benefit of creditors though it be usurious. *Matter of Brown*, 10 Daly, 115, following *Chapin v. Thompson*, 89 N. Y. 270.

But by the same authority it seems that the assignee may plead usury as to a claim not preferred. An assignee will not be compelled to allow creditors to inspect stock. If they offer to purchase, the assignee will be held responsible for accepting or refusing the offer. *Matter of Crowder*, 10 Daly, 132.

ARTICLE X.

MISCELLANEOUS MATTERS OF PRACTICE. §§ 22, 24.

§ 22. Effect of orders and decrees; court always open, etc.; duty and fees of clerk.

All orders or decrees in proceedings under this act shall have the same force and effect, and may be entered, docketed, and enforced and appealed from the same as if made in an original action brought in the county court; provided, however, that a final decree, directing the payment of money, may be enforced by serving a certified copy thereof personally upon the assignee for the benefit of creditors, and if said assignee wilfully neglects to obey said decree by punishing him for a contempt of court. The imprisonment of said assignee, by virtue of proceedings to punish for contempt as prescribed in this section, or a levy upon his property by virtue of an action, shall not bar, suspend, or otherwise effect an action against the sureties on his final bond. All proceedings under this act shall be deemed to be had in court. The said court shall always be open for proceedings under this act. The county judge, when named in this act, shall in such proceedings be deemed to be acting as the court. The clerk of the court shall keep a separate book, in which shall be entered each case, the date and place of record of the assignment, and a minute of all proceedings therein under this act, with such particularity as the court shall direct by general order. He shall record therein at length the orders and decrees of the court settling, rejecting, or adjusting claims, and directing the payment of money or releasing assets by the assignee, and removing or discharging the assignee and his sureties and such other orders as the court shall direct by general order. The said clerk shall securely keep the papers in each case in a file by themselves, and shall be entitled to a fee of one dollar for filing all the papers in each case, and entering the proceedings in the minute-book, and fifty cents to be paid by the assignee, unless otherwise directed, for recording each order or decree required by this act or the general order of the court.

L. 1877, ch. 466, § 22, as amended L. 1878, ch. 318, § 6, and L. 1894, ch. 134.

Art. 11. Powers and Duties of Assignees.

§ 24. Proceedings in New York City.

In the city and county of New York all papers except assignments, which by this act are required to be hereafter filed and recorded in the county clerk's office, shall be filed or recorded in the office of the clerk of the Court of Common Pleas of said city and county; and any judge of said court may exercise all the powers of a county judge for said county for the purposes of this act, and any act or proceeding commenced or returnable before, or instituted or ordered by one of the judges of said court, may be heard, continued, or completed by or before any other of them.

L. 1877, ch. 466, § 24.

On a decree under this act judgment cannot be docketed against the assignee personally, *Matter of Rosenback*, 10 Daly, 128, but must be enforced against the fund; as it is a final order it cannot be enforced by attachment. *Matter of Stockbridge*, 10 Daly, 33; *Matter of Radtke*, id. 119.

ARTICLE XI.**POWERS AND DUTIES OF ASSIGNEES.**

It is the duty of the assignee to reduce to possession the estate assigned to him, and to distribute it as directed by the deed of assignment among *bona fide* existing creditors, giving each his share according to their demands after crediting each payment made by the assignor. *Williams v. Boyle*, 1 Misc. 364, 48 St. Rep. 713, 20 Supp. 720, citing *In re Holbrook*, 99 N. Y. 539.

The assignee can exercise no other and different rights or powers than those which he derives under the assignment. He must distribute the proceeds of the estate under the guidance and direction of the assignment and the statutory provisions regulating and guarding his exercise of authority derived from the assignor. *Matter of Lewis*, 81 N. Y. 421.

The assignee for the benefit of creditors is liable for ordinary negligence or want of that degree of diligence which persons of ordinary prudence are accustomed to exercise in their own business. *Matter of Dean*, 86 N. Y. 398. The obligations of an assignee for the benefit of creditors are those which appertain to voluntary trustees acting gratuitously without compensation. They are bound to exercise that degree of diligence which persons of ordinary prudence are accustomed to use in their ordinary affairs. This duty extends to all the duties committed to his charge, and his whole conduct in the management of the trust is to be considered in view of the powers which he may exercise in

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the recovery and collection of the assets and the general management of the trust. *Matter of Cornell*, 110 N. Y. 351. In the *Matter of the Final Accounting of Barnes*, 140 N. Y. 468, it was held that the assignee was not liable for the loss of interest by his failure to make authorized investments, unless there has been a misappropriation by him or some misfeasance in relation to it. The mere deposit of the funds in his individual name without adding his title as trustee is not of itself such a misappropriation of the fund. It is his duty, however, to keep the trust funds entirely separate and distinct from his own money. *Duffy v. Duncan*, 32 Barb. 587, affirmed in 35 N. Y. 187.

He should not loan the trust money on personal security or use it for business purposes. *Smith v. Smith*, 4 John. Ch. 281; *King v. Talbot*, 40 N. Y. 76 at 96. He may employ necessary agents for the purpose of carrying on the business. *Cascy v. Janes*, 37 N. Y. 608. But he should not employ clerks or agents to continue assignor's business or sell goods at retail. *Carman v. Kelly*, 5 Hun, 283; *Matter of Dean*, 86 N. Y. 398. Nor is it improper to continue the employment of the assignor as his agent, though this is regarded with suspicion. *Ogden v. Peters*, 21 N. Y. 23; *Adams v. Davidson*, 10 N. Y. 309; *North River Bank v. Schumann*, 63 How. Pr. 476; *Beamish v. Conant*, 24 How. Pr. 95. It is his duty to collect and preserve the property of the assigned estate. *McQueen v. Babcock*, 41 Barb. 337; *Van Wagouen v. Terpenning*, 46 Hun, 423, affirmed, 122 N. Y. 222; *Otis v. Hodgson*, 45 St. Rep. 92, 18 Supp. 599. It is the duty of the assignee to convert the assigned property into money without unreasonable delay. *Hart v. Crane*, 7 Paige, 37; *Meachman v. Stearne*, 9 Paige, 398.

But he may not sell on credit without obtaining leave of the court. *Matter of Petchell*, 10 Daly, 102; *Burdick v. Post*, 12 Barb. 168. If power is given in the assignment to sell on credit the assignment is void. *Nicholson v. Leavitt*, 6 N. Y. 510. So too if there is a provision in the assignment authorizing the assignee to continue business for the assignor. *Dunham v. Waterman*, 17 N. Y. 9. This question is very fully discussed in the case of *Levy's Accounting*, 1 Abb. N. C. 185. In event of the continuance of the assignor's business without authority of the court, any loss resulting therefrom will be charged to the assignee. *Matter of Dean*, 86 N. Y. 398. He may sell at private or public

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sale in his discretion. *North River Bank v. Schumann*, 63 How. Pr. 476. He may not himself purchase at a sale any of the assignor's property. *Chapin v. Weed*, Clark's Ch. 464.

Since the statutes regulating assignments, an assignee for the benefit of creditors is something more than the hand of the assignor: he is a trustee for the creditors, and his transactions in respect to the assigned property may be deemed to be conducted by him as such trustee in behalf of such creditors. *Bowditch v. Page*, 81 Hun, 170, affirmed, 153 N. Y. 104, where it was held that when an assignee for the benefit of creditors has obtained a paramount right to the possession of personal property through delivery thereof by the debtor to the assignor, the enforcement of the right is not barred by the assignee obtaining a judgment against such debtor to foreclose his possible equity in the property, followed by an execution and a sale thereunder of the debtor's interest in the property. An assignee is bound to defend the assignment, unless he is acquainted with facts which constitute the fraud for which the same was set aside; and in the performance of such duty he should not be personally charged with the costs of the action. *Faxon v. Mason*, 76 Hun, 408, affirmed on opinion below, 148 N. Y. 750.

An assignment in due form is valid as between the parties, and on acceptance of the trust by the assignee he becomes bound to execute its directions. If fraudulent, it is only voidable by actual adjudication; and until an attack is made with a view to such determination, it will be treated as valid, and must be executed accordingly. *Knower v. Central Nat. Bk.*, 124 N. Y. 552.

The assignor for the benefit of creditors can be compelled to fulfil the unperformed contract of his assignor to deliver goods. *Matter of Adams*, 15 Abb. N. C. 61. Where a general assignment was made on January 5th which included a lease of premises where the owner's business was carried on, the rent of which fell due January 1st, it was held that the assignee could not be compelled to pay for occupation thereof where rent was the rent reserved in the lease, and that such rent was proved as a claim against the estate. *Anderson v. Hamilton*, 29 St. Rep. 712, 3 Supp. 858. Where certain specified bonds were bought and paid for, and were in the possession of the purchaser until delivered with certain other bonds to a broker for sale, and the broker does not sell them, the assignee for the benefit of creditors of the broker

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cannot successfully assert title thereto. *Anderson v. Welling*, 84 Hun, 40, affirmed, 152 N. Y. 639.

The liability of an assignee for the benefit of creditors for acts of his co-assignee is considered and decided in *Bruen v. Gillett*, 115 N. Y. 10, and held to be the same as in case of trustees. The rule is subsequently stated in *Nanz v. Oakley*, 120 N. Y. 84, citing *Bruen v. Gillett*, 115 N. Y. 10, *supra*, being that such trustees are jointly responsible for joint acts, and each is separately answerable for his separate acts and defaults, citing in turn *Croft v. Williams*, 88 N. Y. 384; *Adair v. Brimmer*, 74 N. Y. 539; *Ormiston v. Olcott*, 84 N. Y. 339. Where an assignor had an outstanding order for stock which the seller refused to deliver, but which he delivered upon the assignee's promise, "I will see that you get paid," it was held sufficient to justify a finding of an original promise binding the assignee personally. *Roozen v. Clonin*, 13 App. Div. 190, 43 Supp. 395. The liability of the assignee for rent of premises leased by his assignor rests upon privity of estate arising between the assignee and the lessor, and attaches only under such covenants as mature during his possession, and if the rent is payable on the first day of the month in advance and the assignment is made on the second day of the month the assignee is not liable as such for that instalment of rent. *Walton v. Stafford*, 14 App. Div. 310, 4 N. Y. Annot. Cases, 114, 43 Supp. 1049.

Where an assignee defends suits pending at the time of the assignment and judgment is rendered against defendants with costs against the estate on the accounting, the court may, if it finds the assignee guilty of misconduct in conducting the defence, charge him personally with costs. He is not entitled to money overpaid workmen employed in the business of the estate, and where he unnecessarily discounts notes due the estate at less than their face value, he is properly chargeable with their face value. *In re Dorr*, 4 Supp. 754, 22 St. Rep. 124. The power of the court to order an assignee to pay a claim for rent is limited to the time of the accounting. *Matter of Devlin & Co.*, 24 App. Div. 219, 48 Supp. 950, 82 St. Rep. 950.

The administrator of a deceased assignee for creditors of a firm takes no title to the assigned estate and cannot make a valid transfer thereof. *Hayne v. Sealy*, 22 Misc. 243, 48 Supp. 769, 82 St. Rep. 769. Prior to the making of an assignment an attach-

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ment was levied on the goods of a firm and they were housed on the demised premises; the attachment was subsequently vacated and the assignee made an arrangement for a reduction of rent and decided to remain on the premises by the month; *held*, that he was not personally liable for the rent while the sheriff was in possession. *Stephens v. Stein*, 30 St. Rep. 390. An assignor who refuses to deliver title deeds or give necessary information of the assigned estate to the assignee may be ordered upon application of the latter to appear and submit to an examination. *Matter of Strauss*, 1 Abb. N. C. 402.

Where pursuant to the directions of the assignment, and before any lien attaches upon the fund, the assignee pays creditors, he may hold the funds in his hands, although the assignment is subsequently declared fraudulent. *Knower v. Central Nat. Bank*, 124 N. Y. 552, 37 St. Rep. 89. Where a collecting bank arranged to remit promptly all amounts of checks, drafts, notes, etc., sent on for collection, and used the money received in such collections in settlement of firm debts previous to making an assignment, the forwarding bank stands in the same position as other creditors, since the identical money was not expected to be returned. *Nat. B. & D. Bank v. Hubbell*, 117 N. Y. 384, 27 St. Rep. 396. Where the landlord voluntarily takes possession of the premises, the indebtedness of the tenant for rent is not a debt "due and owing" by the tenant to the landlord within the meaning of these words as they are used in the General Assignment Act, and the general assignee is not authorized to pay such a claim. *Matter of Willis*, 44 St. Rep. 470, 18 Supp. 412.

Where the fund was deposited by the assignee by order of the court with a trust company during the pendency of an appeal involving the validity of the assignment, and such fund was afterwards directed to be returned to the custody of the assignee, it was held that he was bound to pay the money as directed in the assignment without awaiting the further order of the court to that effect. *Hooper v. Beecher*, 61 Hun, 370, 40 St. Rep. 756. Where it appeared that an assignee had made advances to one of the preferred creditors under the assignment exceeding its *pro rata* share, and a decree was made directing the assignee to pay the amount of such excess to another creditor preferred under the assignment, it was held that the decree on accounting was consistent with a claim made by plaintiff in a subsequent action

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and was not a bar to his recovery. That the action was in its nature for money had and received. *Otts v. Crouch*, 89 Hun, 548. An assignee for benefit of creditors is not an officer of the court, and until he is removed in the manner prescribed by statute he is entitled to the possession of the assigned estate. *People v. St. Nicholas Bank*, 85 Hun, 277.

Expenditures incurred and made by an assignee for benefit of creditors in the unsuccessful defence of a suit to set aside an assignment are not made for the benefit of the assigned estate. The rule is that an allowance for expenditures by an assignee shall be limited by the fact of the service for which they may be made, and must be proven to be essential and beneficial to the assigned estate. An assignee under such circumstances may protect himself by requiring creditors who are interested in maintaining the assignment to indemnify him against any expenditures he may make in defending the action. *Meyer v. Hazard*, 17 St. Rep. 26.

An assignee for benefit of creditors will not be charged personally with the costs of an action unless mismanagement or bad faith is shown. *Jack v. Robie*, 48 Hun, 181. The rule that a general assignee is not a purchaser for value is reiterated in *Kennedy v. Wood*, 52 Hun, 46. Declarations of an assignor and her son as to the existence of a partnership between them, the admission of which is limited so as to affect them alone, cannot operate against the title of the general assignee of the mother. *Sweetser v. Davis*, 26 App. Div. 398, 49 Supp. 874, 83 St. Rep. 874.

A judgment recovered against the assignor and her son and a judgment confessed by them, in each of which it is stated that they are partners, are not effective by way of estoppel as to the general assignee of the mother, as there is no privity between the judgment creditors and him or between them and the creditors whom he represents. *Sweetser v. Davis*, 26 App. Div. 398, 49 Supp. 874, 83 St. Rep. 874. An assignee for the benefit of creditors is not an "official assignee" within the meaning of that term as used in subdivision 4 of § 3268 of the Code, and he cannot be required to give security for costs in an action brought by him upon a cause of action which accrued before the assignment. *Lintner v. Long Island Fire Ins. Co.*, 22 Misc. 305, 49 Supp. 1105, 83 St. Rep. 1105.

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ARTICLE XII.

PROCEEDINGS TO OBTAIN ACCOUNTING. §§ 11, 12, 13, 14, 15,
16, 17, 18, 19.**§ 11. Accounting.**

A citation may be issued to all parties interested in the estate assigned, as creditors or otherwise, requiring them to appear in court on some day therein to be specified, and to show cause why a settlement of the account of proceedings of the assignee should not be had, and if no cause be shown, to attend the settlement of such account. The county court must issue all citations mentioned in this act which must be returnable in court. It may issue a citation on the petition of an assignee at any time after the assignment or on petition of a creditor, or an assignee's surety, or an assignor, at any time after the lapse of one year from the date of such assignment, or where an assignee has been removed and ordered to account as hereinbefore provided.

L. 1877, ch. 466, § 11. Amended L. 1878, ch. 318, § 3.

§ 12. Party cited.

A citation issued on the petition of a creditor may be addressed to and served on the assignee alone, but on or after the return of such citation the assignee may have a general citation issued to all parties interested.

L. 1877, ch. 466, § 12.

§ 13. General citation; how, and on whom to be served.

A citation to all persons interested must be served on all parties other than the petitioner who are interested in the fund, including assignors, assignees, and their sureties, except that if the time limited by due advertisement for presentation of claims has expired before the issue of the citation, creditors who have not duly presented their claims need not be served. In case the creditors of such assignor, who have proved their claims, exceed twenty-five in number, then the county judge, upon proof by affidavit that such creditors exceed such number, may by order direct such citation to be served on each creditor who has proved his claim, by depositing a copy of the same, at least thirty days prior to the return day thereof, in the postoffice at the place where the assignee or assignees, or either of them, reside, duly inclosed and directed to each of such creditors, at his last known postoffice address, with the postage prepaid; and by publishing such citation once a week for at least four weeks prior to such return day in one or more newspapers, to be designated by such county judge as most likely to give notice to such creditors.

L. 1877, ch. 466, § 13, as am'd L. 1878, ch. 318, § 4.

§ 14. Time of service.

A citation personally served within the county of the judge or an adjoining county must be so served at least eight days before the return thereof; if in any other county, at least fifteen days before the return day thereof.

L. 1877, ch. 466, § 14.

§ 15. Service by publication.

The county judge may direct service to be made by publication when he is satisfied, by affidavit or verified petition, either that the person to be so served is unknown, or that his residence cannot, after diligent inquiry, be ascertained, or that he cannot, after due diligence, be found within the State. The order for such service must direct service of the citation upon such person to be made by publication thereof in one

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newspaper, to be designated by the county judge as most likely to give notice to the person to be served; and also, if it appear that any such person resides without the State, then in the State paper for such length of time as he may deem reasonable, not less than once a week for six weeks, and that a copy of the citation be forthwith deposited in the postoffice, duly inclosed and directed to each person so served, at his last known place of residence or postoffice address, and the postage paid thereon, at least thirty days before the return day thereof. (Note that State paper is abolished.)

L. 1877, ch. 466, § 15.

§ 16. Personal service without the State.

When publication has been ordered, personal service without the State made if within the United States at least thirty days, or without the United States, at least forty days before the return day, is equivalent to publication and mailing.

L. 1877, ch. 466, § 16.

§ 17. Service on minors, etc.

Personal service upon minors and persons incompetent shall be made in the manner prescribed by law for the service of citations issued by a surrogate, in cases of final accounting.

L. 1877, ch. 466, § 17.

§ 18. On joint creditors.

Personal service upon one of two or more creditors who claim as co-partners or otherwise as joint creditors shall be equivalent to personal service on all, and voluntary appearance, either in person or by attorney, shall be equivalent to personal service.

L. 1877, ch. 466, § 18.

§ 19. Appearance without service.

On the return of a citation to all parties interested, any person claiming an interest, although not served, may appear and become a party on duly presenting his claim.

L. 1877, ch. 466, § 19.

The provision for an accounting by citation is the usual and expeditious method prescribed by statute for settlement of the assigned estate, but it is held that it is not exclusive of the proceeding by suit in equity *Converseville Co. v. Hill*, 14 Hun, 609; *Hurth v. Bower*, 30 id. 151. The Supreme Court will not take jurisdiction when proceedings have been commenced under the statute. *Niagara Bank v. Lord*, 33 Hun, 557; *Chipman v. Montgomery*, 63 N. Y. 222. But if made to the county court the proceeding must be by citation (*Matter of O'Brien*, 16 Week. Dig. 435), which is returnable before the court. *Matter of Davis*, 10 Daly, 31.

It is a special proceeding. *Matter of Thorn*, 10 Daly, 71. Under practice where suit is brought, it is held (*Travis v. Myers*, 67 N. Y. 542) that where different creditors had brought suit for accounting against a general assignee, that proceedings would be stayed in all actions except that first brought, and the creditors

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compelled to come in and prove their claims against the assigned estate in that action. And where an action has been brought the court will not grant a citation for settlement under the statute. See, also, *Schuele v. Reiman*, 86 N. Y. 270; *Matter of Cromien*, 10 Daly, 41. And in case of long delay the court will put the assignor to his action, in case he desires an accounting. *Matter of Darrow*, 10 Daly, 141. The assignor cannot defeat an accounting by denying the indebtedness of the assignor to the petitioning creditor. Nor is it available to the assignee to defeat an accounting, that he has given no bond. *Matter of Farnum*, 14 Hun, 159. The proceeding under the statute is, by an order to show cause why the settlement should not be had. *Matter of Cowing*, 26 Hun, 214. Where proceedings were pending to test the validity of the assignment (*In Matter of Bowery National Bank*, 1 Abb. N. C. 404), the court, in its discretion, refused to grant a citation to compel the assignee to account until a decision had been reached in the action; the proceeding is by petition to the court. Any creditor verifying his claim may make such petition, and a previous adjudication as to the validity of his claim is not necessary; this may be had on the accounting. *People v. Chalmers*, 1 Hun, 683; *Matter of Farnum*, 14 id. 159.

Where a creditor duly mails a verified claim to an assignee for the benefit of creditors and it is duly presented, evidence that the latter was duly mailed will sustain an inference that the person to whom it was directed received it, though he testified to the contrary. *Matter of Wiltsie*, 5 Misc. 105.

In order to make service by mail available, it must be pursuant to an order of the court made upon the proof required by the statute.

Precedent for Petition by Creditor for an Accounting.

ULSTER COUNTY COURT.

In the Matter of the Final Accounting of William T. Humphrey, as General Assignee of Willard Marsh and James B. Winne, under a general assignment for the benefit of creditors.

To the County Court of Ulster County :

The petition of Edgar F. Hale respectfully shows :

First. That upon the 21st day of August, 1884, Willard Marsh and James B. Winne, co-partners in trade, doing business at and

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residing at Big Indian, Ulster County, N. Y., under the firm name or style of Marsh & Co., executed in due form of law, a general assignment for the benefit of creditors, to William T. Humphrey, of Big Indian, N. Y.

That upon the 22d day of August, 1884, the said general assignment was recorded in Ulster County clerk's office, and the said assignee, William T. Humphrey, at the time of the making of said assignment, duly accepted said assignment and trust, and qualified as such assignee, and entered upon the duties of his trust.

Second. That the inventory and schedules as required by law were made and filed by the said assignee, within the time required by law, in the Ulster County clerk's office, and that thereafter the said assignee gave a bond as such assignee for the sum, and approved as required by the statute of this State.

Third. That the claim of your petitioner against the said estate is for \$1,267, for goods, wares, and merchandise sold to the said firm of Marsh & Winne prior to the said assignment and within six years last past.

That no part of the said claim has been paid. That the said claim against the said estate was duly verified and presented to the assignee.

Fourth. That eighteen months have elapsed since the making and recording of said assignment, and that no account has been filed.

And your petitioner, therefore, prays that a citation may issue out of and under the seal of this court, to all the persons interested in said assigned estate, requiring them to appear in court upon some day to be specified therein and to show cause why a settlement of the account of the proceedings of the assignee should not be had, and if no cause shown to attend the settlement of said accounts.

Dated February 25, 1886.

EDGAR F. HALE.

(Add verification as to pleading.)

Precedent for Petition by Assignee.

(Title.)

To the Honorable County Court of Ulster County :

The petition of James H. Everett respectfully shows : That on the 3d day of July, 1885, Cornelius Martin, then doing business in the town of Ulster, said county, and then and now residing in said town of Ulster, made and executed in due form of law, a general assignment to your petitioners for the benefit of his creditors, which said assignment was, on the same day, duly recorded in the Ulster County clerk's office, and on July 6, 1885, duly recorded in the Orange County clerk's office.

That your petitioner accepted said assignment and entered upon the discharge of his duties thereunder.

That the inventory and schedules required by law were made and filed by your petitioner with William S. Kenyon, county judge of Ulster County, on July 17, 1885, and on the same day duly filed in the Ulster County clerk's office, and that on July 18, 1885, your

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petitioner made his bond as such assignee, with the sureties required by law, and on July 20, 1885, after the same had been approved by the county judge of Ulster County, the same was duly filed in the Ulster County clerk's office. Such bond being for the faithful discharge of his duties as such assignee, and for the due accounting for all moneys that might come in his hands as such assignee. That upon said bond Anthony Benson and William F. Romer were the sureties. That said William F. Romer has since died, and Myron Teller, of Kingston, and Rogers B. Williams, of Ithaca, are the administrators of the estate of said deceased.

That afterward, and on the 28th day of July, 1885, your petitioner applied for and obtained from Hon. William S. Kenyon, county judge of Ulster County, an order authorizing your petitioner to advertise for creditors to present to him their claims, on or before a day to be therein specified, and that notice was duly published, as provided by said order, and that the time within which claims were to be presented to your petitioner has expired, and that the following named creditors have presented claims to your petitioner, and are, or claim to be, interested in the distribution of the trust fund created by said assignment. The names and residence of creditors who have presented claims are as follows :

(Here follow creditors, residences, and amounts of claims.)

That from the schedules filed as aforesaid, and from other sources, your petitioner has learned of the following other creditors of the assignor:

(Here insert creditors, residences, and amounts.)

Wherefore your petitioner prays that a citation may issue out of and under the seal of this honorable court to all persons interested in the said assigned estate, requiring them to appear in court upon some day therein specified, and to show cause why a settlement of the account of proceedings of the assignee should not be had ; and if no cause be shown, to attend the settlement of such account.

Dated May 28, 1886.

JAMES H. EVERETT.

(Add verification as to pleading.)

Precedent for Order for Citation.

(Title.)

(Caption usual form.)

On reading and filing the petition of James H. Everett in the above matter, verified May 28, 1886, and on application of S. T. Hull, of counsel for said petitioner, it is

Ordered, that a citation issue herein to all parties interested in the estate assigned by Cornelius Martin to James H. Everett, by a general assignment dated on the 3d day of July, 1885, and recorded on the same day in the Ulster County clerk's office, to appear in court on a day therein to be specified, and to show cause why a settlement of the account of proceeding of the said James H. Everett as such assignee should not be had, and if no cause shown, to attend the settlement of such account.

WILLIAM S. KENYON,
Ulster County Judge.

 Art. 13. The Accounting and Distribution.

Precedent for Citation to Attend Accounting.

The People of the State of New York, to all persons interested in the estate assigned by CORNELIUS MARTIN to JAMES H. EVERETT, for the benefit of creditors, as creditors or otherwise :

You and each of you are hereby cited and required to appear in the Ulster County court, at the chambers of the judge thereof, in the city of Kingston, said county, on the 24th day of June, at ten o'clock in the forenoon of that day, to show cause why a settlement of the account of proceedings of James H. Everett as general assignee of the said Cornelius Martin should not be had, and if no cause be shown to attend a settlement of such account.

[L. s.] Witness, Hon. William S. Kenyon, judge of said court, and the seal of said court, the 29th day of May 1886.

S. T. HULL,

Attorney for Assignee.

JACOB D. WURTZ,

Clerk.

ARTICLE XIII.**THE ACCOUNTING AND DISTRIBUTION.**

SUB. 1. THE ACCOUNT. § 20.

2. COSTS AND COMMISSIONS. § 26.

3. THE DECREE AND DISCHARGE THEREFROM.

SUB. I. THE ACCOUNT. § 20.

§ 20. Power of the county court on accounting.

On a proceeding for an accounting under this act, the county court shall have power :

1. To examine the parties and witnesses on oath in relation to the assignment and accounting, and all matters connected therewith, and to compel their attendance for that purpose, and their answers to questions and the production of books and papers.

2. To require the assignee to render and file an account of his proceedings and to enforce the same in the matter provided by law for compelling an executor or administrator to comply with the surrogate's order for an account.

3. To take and state such account, or to appoint a referee to take and state it; and such referee shall have the powers enumerated in subdivision one of this section.

4. To settle and adjudicate upon the account and the claims presented, and to decree payment of any creditor's just proportional part of the fund, or, in case of a partial accounting, so much thereof as the circumstances of the case render just and proper.

5. To discharge the assignee and his surety at any time, upon performance of the decree, from all farther liabilities upon matters included in the accounting, to creditors appearing and to creditors not having appeared after due citation, or not having presented their claims after due advertisement.

6. On proof of a composition between the assignor and his creditors, to discharge the assignee and his sureties from all further liability to the compounding creditors appearing or duly cited, and to authorize the assignee to release the assets to the assignor; provided, however, that if there be any creditors not assenting to the composition, the court shall determine what proportion of the fund shall be paid or reserved for creditors not assenting, which shall not be less than the sum or share to

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which they would be entitled if no composition had been made, and may decree distribution accordingly.

7. To adjourn the proceedings from time to time, issue further citations if necessary, and amend the petition and proceedings thereon, before decree in furtherance of justice.

8. To punish as for a contempt any disobedience or violation of any order made or process issued in pursuance of this act, or the acts hereby amended, and to restrain by arrest and imprisonment any party or witness when it shall satisfactorily appear that such party or witness is about to leave the jurisdiction of the court, and to take bail or secure the attendance of such party or witness, to be prosecuted under the order of the court in case of forfeiture by and for the benefit of the party in whose interest such examination shall be ordered.

9. To exercise such other or further power in respect to the proceedings and the accounting therein as a surrogate may by law exercise in reference to an accounting by an executor or administrator.

L. 1877, ch. 466, § 20, as amended L. 1878, ch. 318, § 5.

The account, when filed, may be passed upon by the court or sent to a referee; the former is the usual practice outside New York City, but in the city of New York the practice is to send the matter to a referee to take and state the account.

Although a court of equity has jurisdiction in an action against an assignee to compel an accounting, it will decline to take cognizance of it where it appears that the statute relating to assignments affords the plaintiff all the relief which he could obtain by proceeding in the Supreme Court in an equitable action. Such a case should not be subjected to the costs and expenses of an action unless there are exceptional grounds for such a course, in which case the reasons should be clearly alleged. *Hynes v. Alexander*, 2 App. Div. 109. The court says that this is not in conflict with the rule in *Hurth v. Bower*, 30 Hun, 151, since the plaintiff there alleged sufficient reasons for the intervention of the equitable powers of the court.

The Supreme Court has jurisdiction to proceed either in an action or by petition to compel an assignee to account, but it is the court and not the creditors which elects as to the mode of procedure to be followed in a particular instance, and it will only proceed by action in the Supreme Court when special reasons exist therefor. *Stoczner v. Nolan*, 19 App. Div. 338, 46 Supp. 587. It has been held that claims may be presented by mail, following the practice in reference to the estates of decedents. *Matter of Wiltzie & Fromer*, 5 Misc. 105. Nor is the form or proof of claim prescribed. *In re Ranger*, 26 N. Y. Supp. 866.

The granting of an order and citation to creditors to attend a

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final accounting by the county judge, instead of the county court, is a mere irregularity, which is waived by appearance without objection. *Langford v. Cook*, 23 Week. Dig. 309. An assignee may be required to account upon the application of a creditor, without bringing in all parties interested. *Matter of Cowing & Co.*, 13 Week. Dig. 420. A decree on accounting in New York City should only affect creditors who have been duly notified to produce claims by advertisement and mailing. *Matter of Kahn*, 5 Law Bull. 87. On a decree adjudging that an assignee has in his hands a specified sum applicable to payment of creditors does not authorize the docketing of a judgment personally against the trustee as a matter of course; a trustee cannot be charged individually, as for breach of trust, without an opportunity to be heard. *Matter of Jung*, 65 How. 476; *Matter of Rosenback*, 10 Daly, 128. Where the amount is small, leave has been given to the assignee to compromise a disputed claim on the petition and proofs, without a reference. *Matter of Wooster*, 10 Daly, 6. Where an action is pending, leave to compromise will not be given the assignee where creditors oppose who are preferred, and whose evidence will be available to assignee on the trial. *Matter of Goldschmidt*, 10 Daly, 38. Where proceedings for settlement of an assignee's account are pending in the county court, its jurisdiction should not be interfered with by authority of a higher court unless for a substantial reason; but it seems the Supreme Court will exercise its jurisdiction in a proper case. *Chapman v. Montgomery*, 63 N. Y. 222; *Schuchle v. Reiman*, 86 id. 270; *Niagara Co. Bank v. Lord*, 33 Hun, 557; *Hurth v. Bower*, 30 id. 151. The last case cited holds that where, in case of action for an accounting by a creditor, the cause is referred, the court may prescribe the notice to be given to creditors by the referee. It is not confined to nor obliged to adopt the notice prescribed by the statute. An assignee who has not complied with the rules of Common Pleas, requiring him to mail notices to all creditors, is not in a position to cite parties interested to a final settlement. *Matter of O'Brien*, 16 Week. Dig. 435. It is said, in *Matter of McClellan*, 10 Daly, 72, that if an assignment gives a preference to a person the assignor did not owe, though it would be held fraudulent in an action by a creditor, in the absence of objections by creditors, the assignee is bound to pay the claim.

Under an assignment by members of an insolvent co-partner-

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ship of their individual and co-partnership property, if the individual estate of one of the assignors is more than sufficient to pay his individual debts, an individual creditor is entitled to principal and interest on his claim. *Ex parte Murray*, 6 Paige, 204; *Matter of Duncan*, 10 Daly, 95. Where an assignee for the benefit of creditors has incurred liability for rent in retaining premises occupied by the assignor, the question is whether in so doing he acted as a prudent and cautious man would have acted in his own affairs. *Matter of Edwards*, 10 Daly, 68. The actual value of the property assigned, as stated in the schedule, is *prima facie* the amount with which the assignee is chargeable, and the burden is upon the assignee to show that the value is less, or upon the attacking creditors that it is greater. *Matter of Wolf*, 1 St. Rep. 273. There must be an accounting before the assignee and his bond can be discharged. *Matter of Yeager*, 10 Daly, 8; *Matter of Dryer*, id. 8. Where the assignor and the creditors have slumbered for many years on the rights, and the assignee, by reason of the loss of papers and death of many persons, would be put to a great disadvantage in accounting, the court will refuse an application to compel an accounting. In such case the parties will be left to an action. *Matter of Darrow*, 10 Daly, 141. Where the petition is made by a creditor, the fact that the assignee disputes the claim of the creditor is not a ground for denying the application. *Matter of Davis*, 10 Daly, 31. The report of the referee should show proof of service upon creditors of notice to present claims and of the citation upon the accounting, and who of them appeared on the accounting. *Matter of Phillips*, 10 Daly, 47. A claim was allowed in *Matter of Woodward*, 67 How. 359, where presented too late, on ground that, by order of reference, referee could fix time. On a reference on accounting, where the referee is to pass on disputed claims, the burden is on a claimant whose claim is not in schedule, if objected to. *Matter of Jesselson*, 10 Daly, 104. An assignee for benefit of creditors has no right to carry on the business of the assignor, and the trust estate cannot be charged with a loss made by him therein. *Re Accounting of Dean*, 13 Week. Dig. 77. Where business of assignor was carried on by assignee, and it does not appear such continuance was a benefit to the estate, he will not be allowed the expenses thereby incurred. *Matter of Pitchell*, 10 Daly, 102; *Matter of Marklin*, id. 122.

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An assignee who continued the business is chargeable with the value of goods, if sold at auction, less expenses of such sale. *Matter of Rice*, 10 Daly, 1. An assignor is liable for the rent of a store leased to his assignee in which he allows stock to remain after the assignment, although the assignee files no bond as required by statute. *Powers v. Carpenter*, 15 Week. Dig. 155. An assignee for benefit of creditors cannot be compelled to perform the unperformed contract of his assignor to deliver goods. *Matter of Adams*, 15 Abb. N. C. 21. An assignee for the benefit of creditors is entitled to have his entire account settled in one accounting, which will protect him against all the parties, and cannot be called upon to account separately to different creditors. *Bailey v. Bergen*, 67 N. Y. 346. On the final accounting all creditors must have notice even though they have signed releases. *Matter of Leurenthal*, 5 Abb. N. C. 304, n. The court cannot make an *ex parte* order for the payment by an assignee of moneys alleged to belong to creditors as consignors of the assignor, but all the creditors should have notice, and in such a case a reference may be ordered and the creditors may contest. *Matter of Watson*, 3 How. (N. S.) 313. Exceptions to the report of a referee on an accounting must be in writing and specific. *Levy's Accounting*, 1 Abb. N. C. 177. And a reference will only be ordered when all the creditors are brought in. *Matter of Cotlow*, 5 Abb. N. C. 301. The rule in equity that creditors who did not appear after advertisement and prove their claims before a referee in a suit for an accounting cannot share in proceeds is not applicable to an accounting under the General Assignment Act. *Matter of Currier*, 8 Daly, 119. It is said in the same case that all creditors whose names appear in the schedules with the proper statement of the claims, and whose claims are not contested, are entitled to share in the dividend, though the claims are not presented to the assignee. On the other hand, in *Matter of Baily*, 58 How. 446, it is held that a creditor, even though his name appears in the schedule, is not entitled to share in the estate if he has failed to prove his claim. The decree of a county judge upon the final accounting of an assignee is a final judgment within the meaning of § 1340 of the Code, and to perfect an appeal, security must be given as required by § 1341. *Matter of Beckwith*, 15 Hun, 326. An order of the court is necessary to discharge an assignee. *Brennan v. Wilson*, 71 N. Y. 502. And before such

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discharge the court will see that the rights of all the creditors are protected. *Matter of Horsfall*, 5 Abb. N. C. 289; *Keily v. Dusenbury*, 42 N. Y. Super. 238. An assignee will not be permitted, when discharged, to reconvey the property to the assignee, but he must account; he is a trustee for the creditors. *Matter of Backer*, 3 Abb. N. C. 379; *Matter of Parker*, 5 id. 334; *Brennan v. Wilson*, 7 Daly, 59. An assignee must account even after a composition. *Matter of Groencke*, 10 Daly, 17; *Matter of Dyer*, id. 8; *Matter of Yeager*, id. 7; *Matter of Horsfall*, 5 Abb. N. C. 289. It is settled practice of the Court of Common Pleas to grant an order of reference upon the application of an assignee for his discharge. When not preferred, the court will not compel the assignee to pay taxes and assessments as debts due the State. *Matter of Lewis*, 9 Daly, 220; see 81 N. Y. 421.

A party to an accounting who is served with a citation which is not directed to him in any particular capacity will be held to have been brought in both as a creditor and as a surety on the assignee's bond. *Langford v. Cook*, 23 Week. Dig. 309. In a creditor's suit to settle the account of the assignee for the benefit of creditors, and to distribute the fund, a creditor who did not receive notice to prove his claim, or who, although notified, failed to appear on the reference through misapprehension, excusable mistake, etc., may also, upon terms, after the peremptory day fixed by the referee for the presentation of claims, come in and prove his claim and contest the assignee's account. *Downey v. May*, 19 Abb. N. C. 179.

An objection to the assignee's account which merely recites that the creditors object to the assignee crediting himself with goods sold on execution against the assignor, and ask that the assignee be charged therewith, is not sufficient to entitle the creditors to charge the assignee with such items, on the ground that he was culpably negligent in failing to set the judgments aside, when he knew the same to be confessed by the assignor in favor of his wife the day before assignment. *In re Minks*, 16 Supp. 13. Where a stipulation to extend the time when the accounting should take place was left to the assignee, it was held that in event of a refusal or neglect of the assignee to account within a reasonable time the assignor had a right to invoke the aid of the court to compel such accounting. *Matter of Townsend*, 14 Daly, 76. An order appointing a substituted assignee should provide for an

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accounting by the personal representatives of a deceased assignee and the discharge of the sureties. *Matter of Tousey*, 2 App. Div. 569, 37 Supp. 1023, 74 St. Rep. 319.

Where an assignment was set aside at the suit of a judgment creditor and a receiver appointed, the assignee is only bound to account so far as is necessary to satisfy such judgment creditor's claim in full. *Heywood v. Thacher*, 47 St. Rep. 1, 19 Supp. 321. The Supreme Court has jurisdiction in an action to compel an assignee to account concurrently with the county court. Where an action is brought to obtain an accounting of the estate of a deceased assignor, it was held that failure to make the legal representatives of the deceased assignor parties would not constitute a ground of demurrer. *Wells v. Knox*, 55 Hun, 245, 17 Civ. Pro. 87, 27 St. Rep. 585, 8 Supp. 58, reversing 24 St. Rep. 985, 7 Supp. 45, 17 Civ. Pro. 59.

Where a referee is appointed to take and state the accounts of the assignee in an action brought by a creditor, a motion by other creditors to be brought in as parties plaintiffs will be granted as they become parties to the proceeding by presenting their claims. *Cheever v. Brown*, 128 N. Y. 670, 40 St. Rep. 610, reversing 36 St. Rep. 131, 12 Supp. 607. Mailing a verified claim to the assignee is due presentation thereof. Proof that claims were mailed in an envelope, properly addressed and indorsed thereon by sender's address, with a request to return within a certain time if not delivered, is sufficient to authorize the finding that they were received, although the receipt thereof is denied. *Matter of Wiltsie & Frommer*, 5 Misc. 105, 25 Supp. 733. An assignment for the benefit of creditors is in no sense a contract between the debtor and his creditors and does not depend for its validity upon their assent. Where a debtor has acted without fraud in fact or in law and has complied with the requirements of the statute, the assignment will stand, notwithstanding the opposition of a creditor, though by such opposition the creditor is not deprived of his rights to his share; neither the bringing of an action to set aside the assignment on the ground of fraud nor the pendency thereof deprives a creditor of the right to come in and share in the distribution of the assigned estate under the assignment. *Mills v. Parkhurst*, 126 N. Y. 89, 36 St. Rep. 512, reversing in part 30 St. Rep. 138, 9 Supp. 109.

In order that a creditor shall be estopped by any act of his

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from impeaching the validity of the assignment, it must appear that he has accepted an actual benefit under it or assumed such an attitude in relation to the assignment as would be inconsistent with his taking any other position on the matter. *Groves v. Rice*, 148 N. Y. 227. Creditors improperly preferred by way of security are entitled to share with the general creditors in respect to the unpaid portion of their claims. A foreign creditor of a New York firm obtained an attachment on its property in a foreign State; *held*, that such property could be held as preference against the assignee; that the creditor after obtaining the preference was only entitled to that share of the entire estate which it would have received had it not obtained its attachment in the foreign State. *Matter of Sawyer*, 7 App. Div. 198, 40 Supp. 294.

Where a consignor makes a general assignment for the benefit of creditors, the consignee, although his claim for advances was for the full amount unpaid at the time of the assignment, is not entitled to take his dividend from the estate and apply the proceeds of further sales of the consigned goods upon the balance remaining unpaid. *Matter of Atwood & Sons*, 3 App. Div. 578, 38 Supp. 338, 73 St. Rep. 809. A creditor who takes security from a debtor with knowledge that the latter is about to assign can only hold it to the amount which would bring the preferences within one-third of the assigned estate. *Johnson v. Rapalyea*, 1 App. Div. 463, 37 Supp. 540, 73 St. Rep. 156. A creditor of an insolvent assignor holding collateral security may prove his entire claim against the estate without first resorting to the collateral or surrendering or accounting for it. *Matter of Ives*, 11 Supp. 655. One partner cannot, on the accounting of the general assignee of his co-partner, prove a claim for money misappropriated by such partner for his own use, unless there has been an accounting between the partners. *Matter of Sheldon*, 25 App. Div. 182, 49 Supp. 377, 83 St. Rep. 377. Where an assignee allows the firm of which he is a member to sell its goods with those of the assignor on premises of which the assignor held a lease, he is properly chargeable with a proportion of the rent. *Matter of Ludeke*, 22 Misc. 676, 50 Supp. 952, 84 St. Rep. 952. A preferred creditor is not obliged to prove his claim in order to be entitled to notice of final settlement. *Matter of Nims*, 22 App. Div. 195, 47 Supp. 1027, 81 St. Rep. 1027.

Objections to the account of an assignee must be specific and

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must sufficiently apprise him of the charges he is to meet. *Matter of Mather*, 61 Hun, 214, 40 St. Rep. 882, 16 Supp. 13. The Special Term has power to order an assignee to take up and file the report of referee made upon accounting. The fact that he has paid out all the estate will not excuse him from taking up the report and paying the fees. *Ætna Nat. Bank v. Shotwell*, 37 St. St. Rep. 253, 13 Supp. 828. An accounting by and the discharge of the assignee after the commencement of an action to set aside the assignment is not a bar to a second action by the assignee in case the assignment is set aside. *Talcott v. Thomas*, 50 St. Rep. 621, 21 Supp. 1064.

Where one of the assignors died pending an accounting, it was held not to be necessary to suspend the accounting. *Pope v. Briggs*, 50 St. Rep. 742, 21 Supp. 718, affirmed, 137 N.Y. 631. A general objection to specific items in an assignee's account is not sufficient, as the assignee is entitled to have all the items specifically objected to in order that he may meet the objections. *Heywood v. Thacher*, 47 St. Rep. 1, 19 Supp. 321. Objections to an assignee's account are not required to be established by the person making them "beyond peradventure." *Dorney v. Thacher*, 76 Hun, 361, 27 Supp. 787. The general rule of practice requiring the testimony to be signed by the witnesses "in references other than for the trial of the issues in an action or for computing the amount due in foreclosure cases," does not apply to statutory proceedings before a referee to settle the accounting of an assignee. *In re Harris' Estate*, 3 Supp. 621.

In *Mills v. Husson*, 140 N. Y. 99, it was held that the Supreme Court has concurrent jurisdiction with the county court in an action to compel an assignee for the benefit of creditors to account.

In the *Matter of Wiltsie & Frommer*, 5 Misc. 105, where an accounting was had without notice to the creditors entitled thereto, and the fund distributed without providing for such creditors, the latter subsequently applied for a citation and for a further hearing, and the application was granted; the assignee also presented a petition asking for a re-distribution so as to include the creditors who had not been cited on the previous accounting.

Creditors who have appeared, those who have been duly cited and have failed to appear, and those who after due advertisement have not presented their claims are barred by the proceed-

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ings on the accounting. *Matter of Wiltsie & Frommer*, 5 Misc. 105.

The parties not served with a citation but who are entitled thereto are not barred by the accounting. *Matter of Wiltsie & Frommer*, 5 Misc. 105; *Ætna Bank v. Shotwell*, 37 St. Rep. 253.

Trustees under a void assignment must account for the proceeds of the property, with interest, less their commissions and charges. *Norton v. Squire*, 16 Johns. 225. The trustee cannot be credited for expenses of an action, by assignor, which did not relate to the trust fund. *Bell v. Holford*, 1 Duer, 58. An indorsement of a note, by an assignee, as such, does not render him personally liable, but only transfers the title. *Bowne v. Douglass*, 38 Barb. 312. If assignees, under a voidable assignment for the benefit of creditors, pay over the proceeds before any creditors obtain a general or specific lien, they are protected. *Wakeman v. Grover*, 4 Paige, 23. They will be protected as to *bona fide* payments made under such circumstances. *Ames v. Blunt*, 5 Paige, 13. Where the assignee has advanced moneys to pay an incumbrance on the assigned property, and the assignment is declared fraudulent, he will be allowed for the moneys so paid out. *Scouton v. Bender*, 3 How. 185. Moneys that have been paid by the assignee in good faith are allowed on accounting, even if assignment void. *Coope v. Bowles*, 42 Barb. 87; *Young v. Brush*, 28 N. Y. 667. Where the assignee has made payments to the assignor, which were for the benefit of the assigned estate, he may be allowed therefor. *Duffy v. Duncan*, 35 N. Y. 187. The decree made upon an accounting, under the statute, binds all creditors, whether they presented claims or not. *Kerr v. Blodgett*, 48 N. Y. 62. The assignee will be allowed the amount of a preferred claim, by him, although the claim was not formally presented. *Matter of Finck*, 10 Daly, 100. Vouchers will be required. *Matter of Marklin*, 10 Daly, 122. An assignee will not be allowed the losses in the business of the assignor, carried on by him, although he may be allowed certain expenses connected therewith. *Matter of Rice*, 10 Daly, 1; *Matter of Orsar*, id. 26; *Matter of Rauth*, id. 52; *Matter of Pitchell*, id. 102; *Matter of Marklin*, id. 122.

As to the practice before referee, a number of cases have been reported in Common Pleas. It is held (*Matter of Marklin*, 10

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Daly, 123) that the fees of the referee must, if objected to, be taxed, and the same rule in *Matter of Schaller*, 10 Daly, 57, and that stipulation as to them is not binding in *Matter of Currier*, 8 Daly, 119. The creditors may, however, consent to the confirmation of referee's report. *Matter of Weinhaus*, 5 Abb. N. C. 355. And as to the formal parts of the referee's report, directions are given in *Matter of Phillips*, 10 Daly, 47, and also *id.* 57, *supra*.

Precedent for Form of Account.

ULSTER COUNTY COURT.

In the Matter of the General Assignment of
Dunwoody Brothers & Vedder, as a firm, and
individually, to James H. Everett.

I, James H. Everett, respectfully show to the court : That Foster T. Dunwoody, Charles O. Dunwoody. and William O. Vedder, individually, and as composing the firm of Dunwoody Brothers & Vedder, as such firm, and as individuals, all then residing and carrying on business in the city of Kingston, said county, made and executed, in due form of law, a general assignment of their property, as individuals, and as such firm, to me, in trust, for the benefit of their creditors, which said assignment was on the same day duly recorded in the office of the clerk of the county of Ulster, in Book of Deeds No. 249, page 286.

I accepted the said assignment, and entered upon the execution of the trust thereunder, and took possession of said assigned property. That I duly gave the bond required by law before entering upon the discharge of my duties as such assignee.

That on the 3d day of April, 1884, an inventory of the assigned property, and a schedule of the creditors of the assignors, as required by law, was made and delivered, and filed, both with the county judge of Ulster County and the clerk of the county of Ulster. That by said inventory it appears that the

Liability of said firm was.....	\$15,675 45
Individual liabilities of Charles O. Dunwoody.....	1,265 57
Individual liabilities of Foster T. Dunwoody.....	1,330 15
Individual liabilities of William O. Vedder.....	131 75

That the assets of said firm, as by said inventory, were as follows :	
Goods and stock on hand.....	\$11,176 41
Estimated value of debts due firm.....	1,689 67
Property of Foster T. Dunwoody, consisting of interest in real property, estimated at.....	1,350 00
Property of Charles O. Dunwoody, consisting of interest in real property, estimated at.....	1,350 00

That I duly advertised for the presentation of claims against said

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assignors, such notice to present claims being given under an order of the county court of Ulster County, granted May 27, 1884.

Schedule A, hereto annexed, contains a statement of all the property contained in said inventory, sold by me at public auction or private sale, with the amount realized therefrom; which sales were fairly made by me at the best prices that could then be had, with due diligence, as I then believed; it also contains a statement of all the debts due the said assignors and mentioned in said inventory, which have been collected, and also of all interest for moneys received by me, for which I am legally accountable.

Schedule B, hereto annexed, contains a statement of moneys paid out by me, and expenses in the settlement of the assigned estate.

Schedule C, hereto annexed, contains a statement of moneys paid out by me to creditors of the assignors under the assignment.

Schedule E, hereto annexed, contains a statement of all claims against the assigned property which have come to my knowledge.

I charge myself :

Amount of inventory, goods, stock, etc.	\$11,176 41	
Less as appears by Schedule A.	45 37	
Collected on sale of goods, stock, etc.		\$11,131 04
Accounts, etc., due firm, inventoried.	\$1,689 67	
Less as appears by Schedule B.	340 69	
Collected on account, etc.		1,348 98
Real estate of Charles O. and Foster T.		
Dunwoody, as per inventory.	\$2,700 89	
Less as appears by Schedule A.	659 00	
		2,041 00
		<u>\$14,521 02</u>

I credit myself :

Amount of money paid, Schedule B.	\$ 1,191 89	
Amount of money paid, Schedule B.	11,007 89	
Amount of my commissions.	163 03	
		11,262 81
		<u>\$3,258 21</u>

Leaving a balance of three thousand two hundred and fifty-eight and twenty-one one-hundredths dollars to be distributed according to the provision of said assignment.

The said several schedules which are signed by me are part of this account.

Dated April 25, 1886.

(Here follow schedules.)

ULSTER COUNTY, ss. :

James H. Everett, of said county, being duly sworn, says that the charges made in the foregoing account of proceedings and schedules annexed, for moneys paid by him to creditors, and for necessary expenses are correct; that he has been charged therein all the interest for moneys received by him and embraced in said account, for which he is legally accountable; that the moneys stated in said account as collected were all that were collected, according

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to the best of his knowledge, information, and belief, on the debts stated in such account at the time of this settlement thereof; that the allowances in said account for the decrease in the value, of the assets, and the charges therein for the increase in such value are correctly made, and that he does not know of any error in said account, or anything omitted therefrom, which may in any wise prejudice the rights of any party interested in said estate; that the sums under twenty dollars charged in the said account for which no vouchers or other evidences of payment are produced, or for which deponent may not be able to produce vouchers or other evidences of payment, have actually been paid and disbursed by him as charged. That the accounts set forth in Schedule A, hereto annexed, are uncollected, and as this deponent believes uncollectible by legal proceedings.

(*Jurat.*)

(Signature.)

Order of Reference.

(*Caption usual form.*)

(Title.)

A petition having been duly made and filed herein by Abram Benson, praying that an order be granted for a citation to be issued to all persons interested in the estate assigned by Charles Devine to Abram Benson for the benefit of creditors, dated the 7th day of June, 1884, and the said order having been made and entered, and the said citation having been duly issued thereon: Now, on reading and filing the said citation and proof of due notice thereof, on the assignor, assignees, and their sureties, and on all creditors whose claims have been duly presented after publication of notice; and the said Abram Benson appearing herein by D. W. Ostrander, his attorney, and having presented his account of his proceedings as assignee of the estate of Charles Devine; and (here insert all appearances and objections to said accounts).

It is ordered, that it be referred to Howard Chipp, counsellor-at-law, to take and state the accounts of the said assigned estate, with authority to the said Howard Chipp to examine the parties and witnesses on oath, in relation to the said assignment and accounting, and all matters connected therewith, and to compel their attendance for that purpose, and their answers to questions and the production of books and papers.

And it is further ordered, that the said referee take proof and report as to what persons are entitled to share in the distribution of said assigned estate, and in what priority and proportion.

And it is further ordered, that any party to this proceeding, and any creditor may object to any claim presented before said referee, and that the said referee shall thereupon take the proof and report as to the validity of such contested claims.

And it is further ordered, that the said reference proceed at the office of the referee, and that ten days' notice of the time and place of the first hearing be given to all creditors who have presented their claims to said assignee, or who have appeared upon the return of said citation.

(Signature of Judge).

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Precedent for Referee's Report on Accounting.

SUPREME COURT.

In the Matter of the Accounting of Lucius Lawson, as Assignee of Elmer E. Stewart, survivor of James E. Stewart & Son, and Elmer E. Stewart.

In pursuance of an order of reference made in the above entitled proceeding on the 18th day of September, 1886, by which it was referred to me to take and state the accounts of Lucius Lawson, of the estate assigned by Elmer E. Stewart, survivor of James E. Stewart & Son, and Elmer E. Stewart, for the benefit of creditors.

I do respectfully report :

That a notice to proceed before me on said reference was duly served on attorneys for the assignee and creditors, for the 20th day of October, 1886, at my office, 24 John Street, Kingston City.

I was attended at said time and place by DeWitt C. Ostrander, Esq., attorney for assignee, and Charles A. Fowler, Esq., attorney for creditors, that the reference was thereupon proceeded upon, and adjourned, from time to time, to the 26th day of of November, 1886.

That upon such examination I took the proofs offered by the several parties, which are hereto annexed.

I further report, that in pursuance of an order of Hon. A. B. Parker, dated October 25, 1886, a notice requiring all persons having claims against the said assigned estate to present the same to Lucius Lawson, the said assignee, was duly published as required by said order.

I further report as follows :

First. Said assignee should be charged with the amount of his account as rendered, to wit, the sum of \$11,182.61.

Second. Said assignee should be charged with the following amounts, which have been collected by him and not charged to his accounts, to wit :

Michael Tobin.....	\$ 1 50
Al. Bonesteel.....	116 02
Thomas Coman.....	100 00
Thomas Gadd.....	15 36
Mrs. Toal.....	142 85
Thomas McAuliff.....	13 06
S. A. Van Velser.....	114 02
William Cotta.....	120 20
L. Lawson.....	110 61

	\$ 1,122 62
Which added to assignee's account as rendered.....	11,182 61

\$12,305 23

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Which I am of the opinion is the amount of assets which said assignee should be charged with.

Third. I find that the assignee is entitled to credit for disbursements and expenses actually incurred in the care of the trust to the amount of \$261.06. I have deducted from the amount rendered by him in his statement, and which was filed with me, and is hereto annexed, the item of \$40 marked "incidentals," which I am of the opinion should not be allowed.

Fourth. I find that by deducting credits from disbursements, to wit: the sum of \$261.06 from \$12,305.23, the amount of assets which said assignee should be charged with, leaves the sum of \$12,044.17 to be paid by and accounted for by said assignee, and which should be distributed among the parties entitled to the same, after deducting the costs and expenses of this proceeding.

Fifth. I further report that the following claims have been proved before me, and I have allowed the same, to wit:

N. & J. A. Curtis.....	\$ 122 68
Charles S. Dederick, interest from January 15, 1885..	1,500 00
S. B. Moore & Co., interest from August 8, 1883.....	145 31
Griffeth & Kerr, interest from July 7, 1884.....	159 00
S. F. Myers & Co., interest from January 4, 1883.....	4,000 00
Masten & Hayes, interest from June 1, 1883.....	6,000 00
L. S. Winne & Co., interest from September 2, 1884....	4,000 00
M. N. Cline, interest from May 14, 1884.....	1,876 24
Making in all the sum of.....	\$17,803 23

Sixth. I find that the claims filed and proved before me by Lucius Lawson, as set forth in inventory of assigned estate, filed in Ulster County clerk's office, on the 27th day of August, 1883, of which said Lucius Lawson claims to be holder and owner, to wit:

Note dated July 9, 1883, J. E. Stewart & Son. Indorsed, L. Lawson, George B. Merritt, Kingston Nat. Bank.....	\$750 00
Note dated August 11, 1883, State N. Y. Bank. L. Lawson. Indorsed, Elmer E. Stewart, Merritt & Finger.	500 00
Note dated June 26, 1883, First Nat. Bank, Rondout, J. E. Stewart & Son. Indorsed, L. Lawson, Humphrey Crosby & Ennist.....	435 00
Note dated May 8, 1883, State of N. Y. Bank, J. E. Stewart & Son. Indorsed, L. Lawson, Spencer Ennist.	230 00
Amounting to the sum of.....	\$1,815 00

Should be disallowed, as it appears from the evidence that these claims were paid by Mrs. Frances A. Stewart, widow of James E. Stewart, deceased, and not by said Lucius Lawson.

All of which is respectfully submitted.

T. BEEKMAN WESTBROOK,

Dated March 29, 1887.

Referee.

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SUB. 2. COSTS AND COMMISSIONS. § 26.

§ 26. Trial; fees and costs; commission of assignee.

The court, in its discretion, may order a trial by jury or before a referee of any disputed claim or matter arising under the provisions of this act or the acts hereby amended. It may, in its discretion, award reasonable counsel fees and costs, determine which party shall pay the same, and make all necessary rules to govern the practice under this act. The assignee or assignees named in any assignment shall receive for his or their services a commission of five per centum on the whole sum which will have come into his or their hands.

L. 1877, ch. 466, § 26; as amended L. 1878, ch. 318, § 7.

An assignee in trust is entitled to the commissions stipulated in the deed, unless so disproportionate as to indicate fraud. *Hendricks v. Robinson*, 17 Johns. 438. The commissions of an assignee upon a composition are to be calculated upon the aggregate amount of the composition with the expenses incurred by the assignee in addition. He is only entitled to his commissions on moneys actually received, not on property which came into his hands, but where he has received no moneys, the court may direct such compensation as is proper to be made him before turning over the property. It was said in *Levy's Accounting*, 1 Abb. N. C. 177, that the assignee will not be allowed counsel fees in litigations with the assignor over matters not relating to the trust. The assignee cannot be permitted to make such charges for counsel fees and expenses as will unnecessarily deplete the fund. *Matter of Scott*, 53 How. 441. And allowances cannot be granted to counsel for assignee before final accounting out of the assigned estate. The assignee makes such payments on his own responsibility. *Ex parte Thomas*, 5 Abb. N. C. 354. The assignee must prove the propriety and reasonableness of such payments on the accounting. *Matter of Younge*, 5 Abb. N. C. 346. An assignee for benefit of creditors is entitled to the same allowances as a trustee, for expenses necessarily incurred in the execution of the trust. It is said that he cannot be allowed generally for legal advice in the discharge of the trust, but only in case of litigation. *Ex parte Burbank*, 65 How. 129; see, also, *Matter of Wolf*, 1 St. Rep. 273. (The rule last laid down is not usually followed, and is probably much more honored in the breach than in the observance.) If the assignee does not faithfully discharge the duties of his trust, his commissions may be withheld. *Matter of Coffin*, 10 Daly, 27. Where the assignee is removed for actual misconduct, he is not entitled to commissions.

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Matter of Wolf, 1 St. Rep. 273. And it has been held that the court is not bound to allow commissions. *Matter of Rauth*, 10 Daly, 52. This rule is contrary to that held as to executors and administrators. The assignee was held entitled to costs on reference of a disputed claim where the claim was materially reduced. *Olive v. Lockwood*, 9 Daly, 68. In the Common Pleas it is held that neither costs or counsel fees can be allowed out of the fund to any parties except the assignee. *Matter of Currier*, 8 Daly, 119. On confirmation by consent of counsel, no extra allowance will be granted to counsel for assignee. *Matter of Weinhaus*, 5 Abb. N. C. 355.

The costs allowed on an accounting are as those of a successful action. *Matter of Schaller*, 62 How. 40. The sum of \$25 was held a proper charge for drawing an assignment in *Levy's Accounting*, 1 Abb. N. C. 177. And in the same case it was held that where the estate had been recklessly administered, counsel fees would not be allowed the assignee without a specification of the character and necessity of the services. The allowance to assignees and their counsel should not exceed the statutory compensation to executors and administrators, and the value of a given service is said not to be increased by the magnitude of the estate. An assignee who is a lawyer cannot be allowed fees of counsel to advise him unless special complications or difficulty requires. *Matter of Scott*, 53 How. 441. In *Matter of Shaw*, 18 Hun, 195, it was said the commissions of assignees is the same as of executors, but as to this see the language of the present statute fixing five per cent. The fees of referees are the same as in a civil action. *Matter of Fairchild*, 10 Daly, 74. And a stipulation of counsel as to the amount is not binding. *Matter of Currier*, 8 Daly, 119. On trial before referees, costs before and after trial, and extra allowance not exceeding statutory limit, may be allowed. *Matter of Risely*, 10 Daly, 44; *Matter of Fairchild*, id. 74. The assignor may object to the allowance to the assignee, counsel, or referee. *Matter of Hulbert*, 9 Abb. N. C. 132; s. c. 10 id. 284. In *Havemyer v. Loeb*, 5 id. 338, the rule as to allowances to assign for counsel fees, when assignment has been set aside, is said to be laid down in *Platt v. Archer*, 13 Blatchf. 351, which is referred to with approval. An assignee is not acting in hostility to the assignment when he claims that a preferred claim has been paid since the assignment, and should be allowed his

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counsel fees, although the court does not sustain his claim. *Matter of Schaller*, 10 Daly, 57. It is said, in *Matter of Johnson*, id. 123, that counsel fees will only be allowed for such services as the assignee is unable to perform himself, and that no counsel fees, except for preparing the account, will be allowed on accounting, unless the account is litigated. Counsel will not be allowed a general retainer, nor will the assignee be allowed a counsel fee for litigations in which he has involved himself, or for resisting payment of preferred claims before his accounting. *Matter of Van Horn*, 10 Daly, 131. Commissions will not be refused an assignee except in a clear case of fraud or misconduct. *Matter of Rauth*, 10 Daly, 52. The costs of an accounting are ordinarily to be borne by the trust fund, but if the assignee desires to be relieved from the trust for his own convenience he must bear the expenses. *Matter of Edwards*, 10 Daly, 68. No allowance is made to counsel appearing for creditors in Common Pleas, not even to counsel for a petitioning creditor who is successful in obtaining the removal of an assignee. *Moore v. Jenkins* 5 Law. Bull. 70; *Matter of Watt*, 10 Daly, 11; *Matter of Currier*, 8 id. 119. (This rule, it is believed, is not followed in the county courts throughout the State, where it is usual to grant reasonable allowances to counsel for creditors; certainly to a petitioning creditor in a case such as is cited.)

Where real property assigned was incumbered by mortgages, and there was no specific direction to the assignees to pay them, and the assignees only charged in their accounts the moneys they actually received in cash for the equity of redemption, they are only entitled to commissions on the cash received, and not on the amount of the mortgages. *In re Woven Tape Skirt Co.*, 85 N. Y. 506; *In re Dean*, 86 id. 399; *In re Hulburt*, 89 id. 259; *Matter of Fulton*, 30 Hun, 258. The latter case distinguishes *Cox v. Schemerhorn*, 18 id. 16, which holds a contrary rule as applied to executors. The fact that counsel for the assignee for benefit of creditors has been paid, for services prior to the accounting, a sum charged in the account, does not deprive him of an allowance for services on the accounting. *Matter of Hulburt*, 10 Abb. N. C. 284. In New York City allowances for legal services to assignee are made to assignee and not to counsel. *Matter of Worthley*, 10 Daly, 12. The rule in *Levy's Accounting*, 1 Abb. N. C. 177, that an assignee, himself a lawyer, cannot involve

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the estate in the expenses of employing counsel to advise him without showing special necessity, was reiterated and applied in *Matter of Burbank*, 65 How. 129.

Where money has been paid by mistake to an assignee for creditors in satisfaction of a judgment recovered by him, which judgment was for the identical damages included in another judgment recovered by the assignee against the same party, which was also paid, the county court has power, on the accounting of the assignee, to direct the payment of such money. *Matter of Gschilley*, 24 Misc. 495. The expense of a litigation in actions in which assignee has been unsuccessful with regard to very material issues, should not be charged against the estate. *Matter of Pool*, 59 St. Rep. 214.

Where an assignee defends suits and judgment is rendered against him on the accounting the court can, if it finds assignee guilty of misconduct in conducting the defence, charge him personally with costs. *In re Dorr*, 4 Supp. 754. Although an assignee in making payment to counsel for services in contesting a claim to surcharge his account is not restricted to the statutory allowance in an action against him for an accounting, the statute furnishes a guide in the matter, and the proportion between the amount involved and the compensation claimed should be considered, especially when the estate is small. *In re Applington*, 18 Supp. 357.

An assignee cannot charge the estate for the use of his horse in the business of the estate where his accounts have been carelessly kept with false and erroneous entries. He is not entitled to an allowance for attorney's fees in settling the accounts, and counsel fees may be refused where litigation was unnecessary, and the assignee negligent. *In re Dorr*, 4 Supp. 754, 22 St. Rep. 124. An allowance cannot be granted to the counsel of an assignee for benefit of creditors out of the assigned estate before final accounting. An assignee making any payments to counsel must do so upon his own responsibility. *Matter of Thomas*, 5 Abb. N. C. 354; *Matter of Weinhaus*, 3 Abb. N. C. 355; see *Havemeyer v. Loeb*, 5 Abb. N. C. 338.

The assignor is entitled to have all the assigned estate used for the benefit of the estate and is entitled to be heard upon the question of the amount paid by the assignee for counsel fees and to insist that it shall be reasonable and shall rest upon proper

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proof of the value of the services rendered. *Faxon v. Mason*, 90 Hun, 426.

Where a general assignee undertakes to retain a sum of money which he claims was paid to him for legal services, which is denied by the assignor, objecting creditors should be allowed to cross-examine the assignee in relation to such alleged services. *Matter of Friend*, 23 Misc. 300, 50 N. Y. Supp. 954, 84 St. Rep. 954.

An assignee will not be allowed counsel fees paid for preparing schedules or for general advice or consultations, but an allowance may be made where complicated questions have arisen requiring the aid of counsel or for services in litigation. *Matter of Friend*, 20 Misc. 300, 50 N. Y. Supp. 954, 84 St. Rep. 954.

Claims for legal services cannot be allowed as a distributive share of the surplus, but should appear in the account and be presented under oath. *Matter of Ludeke*, 22 Misc. 676, 50 Supp. 952, 84 St. Rep. 952. Allowances for counsel fees in preparing schedules or for general advice and consultations are usually disallowed. *Matter of Ludeke*, 22 Misc. 676, 50 Supp. 952, 84 St. Rep. 952.

Where the assignee has not disposed of the property in the usual manner, but acting under the advice of all interested has formed a stock company to carry on the assignor's business, and used bonds thereof as far as possible in settlement with the creditors of the assignor, it is proper to charge him with the full market value of the assigned property, and credit him with incumbrances thereon, the amounts paid by him to the holders of incumbrances and preferred creditors, and his costs, expenses, and commissions. *Matter of Sutcliff*, 83 Hun, 324, 64 St. Rep. 656.

Where the assignee deposited funds in his personal bank account and let them remain there during the pendency of an action to set aside the assignment, he was charged with interest thereon from the time of the bringing of the action. It was held that he was not chargeable with interest beyond what was earned. It appeared that the assignee made no use of the funds in his business, that he had always on deposit to his credit an amount in excess of the balance of funds in his hands. It was held that the law neither authorized nor permitted the assignee to make an investment, and that while he may be responsible for the money deposited in some savings institution, he could not be charged

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beyond what it had actually earned as deposited. *Matter of Barnes*, 140 N. Y. 468, 55 St. Rep. 790, reversing 4 Misc. 136, 23 Supp. 600, 53 St. Rep. 119. It was further held in this case that it was error to hold the assignee chargeable with the amount of costs collected by his attorney in suits brought by the assignee in which he was successful, the attorney having been allowed upon the accounting a gross sum as counsel fees. It was held upon the question of costs that the lien of the attorney was reduced to possession, and his client in the absence of a special agreement entitling him to receive them, could not claim payment thereof to himself; that the allowance of counsel fees did not include and was not intended to be in lieu of the costs collected.

The assignee is chargeable with the profit received on a stock transaction of his assignor, although he claims it was transferred to him just prior to the assignment, when his testimony in relation thereto is in conflict with and denied by the assignor. *Matter of Pool*, 8 Misc. 284, 59 St. Rep. 214, 28 Supp. 707. An assignee who is a party to a fraud for which the assignment is set aside is not entitled to credit for disbursements and should be charged with the costs and expenses of the accounting. *Smith v. White*, 27 St. Rep. 227, 7 Supp. 373. If an assignment for the benefit of creditors is set aside for fraud and the estate is insufficient to pay the creditors, the assignee is not entitled to his commissions. *Dexter v. Adler*, 1 Supp. 684.

The right of an assignee to employ counsel and to pay counsel fees whenever the employment of counsel is necessary, is unquestioned. *Matter of Littel*, 16 Daly 379, 33 St. Rep. 657, 11 Supp. 563. An assignee cannot employ himself, either as individual or as a firm, as counsel and charge such services against the estate. *Matter of Maxwell*, 66 Hun, 151, 49 St. Rep. 154, 21 Supp. 209. In fixing the amount paid by an assignee to his counsel for contesting claims against the estate, the amount involved should be considered in making the allowance. *Matter of Applington*, 45 Rep. 640, 18 Supp. 357. Where an order made on the accounting recited that the allowance of the assignee for services on the accounting was consented to by one of the creditor's attorneys, it was held that the creditor was bound by such consent. *Matter of Maxwell*, 66 Hun, 151, 49 St. Rep. 154, 21 Supp. 209. A credit for payments on account of a preferred debt will not be

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allowed where such payment was made to the assignor personally without receipts, and was not shown to have been turned over to the creditor. *Matter of Pool*, 8 Misc. 284, 28 Supp. 707, 59 St. Rep. 214. See to same effect: *Dexter v. Adler*, 76 Hun, 439, 59 St. Rep. 443, 27 Supp. 1121. But unless there has been bad faith upon the part of the assignee, the necessary costs and expenses on his accounting are a proper charge upon the fund. *Haynes v. Campbell*, 39 St. Rep. 874, 15 Supp. 506. Although this is subject to the rule that the assigned estate should not be charged with the expenses of a litigation over the account of the assignee who was unsuccessful on every material issue. *Matter of Pool*, 8 Misc. 284, 59 St. Rep. 214, 28 Supp. 707.

A general objection to specific items of expenditure by the assignee in the management of the estate is sufficient. Where the assignee is not a party to the fraud in making the assignment and is not cognizant of the facts which make it reasonably certain that such assignment cannot stand against the attack of creditors, his duty requires that he shall resist such attacks; and in order that he may do this it is necessary that he should employ counsel, and his disbursements in so doing come within the class of disbursements allowed to an assignee for preservation of the estate. A trustee in defence of the trust committed to his care is allowed out of the trust reasonable counsel fees in protecting the estate, although he may have been unsuccessful, providing he acted in good faith, and as a reasonably prudent man would do under the circumstances. *Dorney v. Thacher*, 76 Hun, 361. To same effect see *Faxon v. Mason*, 90 Hun, 426.

On the trial of a disputed claim against assignee costs and reasonable counsel fees may be awarded the successful party. *Matter of Barr*, 6 Misc. 526, 56 St. Rep. 742, 27 Supp. 416.

An assignee cannot retain as official counsel the firm of which he is a member; but where he defends an action at law brought after the assignment in good faith for the benefit of the estate and employs and pays outside counsel a reasonable sum, he should be allowed that amount. *Matter of Clute*, 14 App. Div. 234, 43 Supp. 573.

In the *Matter of Hallheimer*, 21 App. Div. 525, it is held, citing *Hess v. Hess*, 117 N. Y. 306, that the fact that the assignee participated in the fraud upon the creditors at the time of the assignment, was sufficient to preclude his being allowed costs and

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expenses in defending suits to set assignment aside and upon the accounting.

SUB 3. THE DECREE AND DISCHARGE THEREFROM.

To authorize an equitable set-off in the case of an assignment for creditors, it is not essential that the mutual debts or claim should both have been due at the time of the assignment, but a debt due a creditor at that time may be set off against his indebtedness to the estate which accrued subsequent thereto. *Matter of Hatch*, 155 N. Y. 401, 50 N. E. Rep. 49, reversing 22 App. Div. 16, 47 Supp. 850, 81 St. Rep. 850.

Decree for Distribution.

(Caption usual form.)

(Title.)

Upon the petition of the above assignee, and in pursuance of an order of the court herein, citations were duly issued herein to all persons interested in the assigned estate by Cornelius Martin to James H. Everett, for the benefit of creditors of the said Martin, dated July 3, 1885, to attend the settlement of the accounts of the said James H. Everett as assignee of said estate, which said citation was dated May 29, 1886, and was made returnable June 24, 1886, and due proof of the service of said citation having been made and filed upon the following persons and corporations, viz.: (here insert parties served.)

And the said James H. Everett having appeared and presented his report on such return day, and having filed his vouchers for the payments made by him, and S. T. Hull having appeared on this accounting for said assignee, A. D. Lent, Esq., appearing for R. C. Horton and Mary B. Horton, C. M. Woolsey, Esq., appearing for C. A. Harcourt, and James T. Van Dalfsen, of Peck, Van Dalfsen & Co., appearing in person, and no objections being made to said account, now, on motion of D. W. Ostrander, Esq., of counsel for said assignee, and on reading proofs of service of said citation, the account of the said assignee, and the vouchers accompanying the same, it is ordered, adjudged, and decreed:

First. That the account of the said assignee, herewith filed, be and the same is hereby approved and affirmed.

Second. That out of the funds in the hands of the said assignee, as appears by said account, to wit, the sum of \$3,435.41, he retain for his commissions and expenses the sum of six hundred and fourteen 55-100 dollars; that he pay to S. T. Hull, his attorneys, on this accounting, the sum of two hundred and twenty-five dollars; to A. D. Lent, Esq., attorney for C. A. Harcourt, fifteen dollars; to C. M. Woolsey, attorney for R. C. Horton and others, fifteen dollars. That said assignee having paid Caroline F. Smith, the first preferred creditor under said assignment, the sum of \$2,120 in full of such claim, it is further ordered that said payment be approved. And it

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further appearing that Peck, Van Dalfsen & Co. have been paid by said assignee the sum of \$3,000, and D. H. Sellig the sum of \$1,000, it is further ordered that said payments be approved, and that such several payments be credited upon the distributive shares due said parties severally. And it further appearing that Peck, Van Dalfsen & Co. are now the owners of the paper indorsed by them, and mentioned in the second class of preferences, and that D. H. Sellig is the present owner of the note indorsed by him and mentioned in said class of preferences, it is further ordered that said assignee pay the balance remaining in hand as follows :

That he pay Peck, Van Dalfsen & Co., beyond the payment already made to them, the sum of.....	\$920.21
That he pay to D. H. Sellig beyond the payment already made to him the sum of.....	857.56
That he pay to C. A. Harcourt the sum of.....	852.22

Third. That the assignee do take good and sufficient vouchers for each and every payment so made, and if, after reasonable diligence, any of the persons so entitled to share in said distribution cannot be found, or shall decline or neglect to accept their said share, then the share so belonging to such person shall be deposited in the Kingston National Bank, to the credit of such person.

It is further ordered, adjudged, and decreed, that upon compliance with the foregoing provision the said assignee shall, upon presenting due proof of the same to the judge of this court, be entitled to an order relieving him of his liability as such assignee, and releasing the sureties upon the bond by the said James H. Everett, as assignee of said estate, from all liability upon matters included in the aforesaid accounting, to all creditors who have appeared, and to such creditors who have not appeared after due citation, and to such creditors as have not presented their claims after due advertisement, and that the said application may be made without further notice.

WILLIAM S. KENYON,
Ulster County Judge.

Order Cancelling Bond of Assignee.

(Caption usual form.)

(Title.)

It being made to appear to this court that Amasa Humphrey, the assignee in the above matter, has fully complied with the provisions as to payments required of him by the conditions of the decree herein granted on the 1st day of March, 1886, and the releases and vouchers showing such payments being herewith read and filed : It is, on motion of Julius Armstrong, attorney for said assignee, ordered that the said assignee be and he hereby is relieved and discharged of and from all liability as such assignee, and the sureties on the bond of said assignee, given under the said assignment, be also relieved and discharged from all liability upon matters included in the aforesaid accounting to all creditors who have appeared, and

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to such creditors as have not appeared, after due citation, and to such creditors as have not presented their claims, after due advertisement.

WILLIAM S. KENYON,
Ulster County Judge.

ARTICLE XIV.

RULES OF FIRST DEPARTMENT RELATIVE TO INSOLVENT ASSIGNMENTS.

Rule VI. The following regulations will apply to all the insolvent assignments for the benefit of creditors and applications to the court thereunder:

SUBDIVISION 1. Duties of the clerk.—The clerk, in addition to the books now kept by him, shall provide a register and docket.

In the register shall be entered in full every decree and final order made in the proceedings, according to date, and the docket shall contain a brief memorandum of each day's proceedings according to the respective titles.

The register and docket shall be at all times, during court hours, open for public inspection.

SUB. 2. Each petition or order or decree filed shall be indorsed with the day and date of such filing, and the papers in each case shall be kept in a file by themselves.

SUB. 3. No paper shall be permitted to be taken off the files of the court for any purpose, except on an order of the court.

SUB. 4. Every paper filed shall have a brief memorandum indorsed on the outside cover, showing the nature thereof.

SUB. 5. Copies of any and all papers in these proceedings shall be furnished to any person applying for same upon the payment of the legal fees.

SUB. 6. Process.—All process, citations, summons, and subpoenas shall issue out of the court under the seal thereof, and be tested by the clerk.

SUB. 7. Appearances.—Any part may appear in these proceedings, either in person or by attorney. If by attorney, the name of such attorney, with his place of business and residence, shall be indorsed on each and every paper filed by him, and his name shall be entered in the docket.

SUB. 8. Schedules.—The schedule of liabilities and assets required to be filed by the assignor or assignee shall fully and fairly state the nominal and actual value of the assets, and the cause for the difference, and a separate affidavit will be required, which shall fully explain the cause of such difference. If required, the affidavits of disinterested experts as to such value must be furnished.

SUB. 9. Signing of.—Where there may be more than one sheet of paper necessary to contain the schedules, each page shall be signed by the person or persons verifying the same. The sheets of paper on which the schedules are written shall be securely fastened before the filing thereof, and shall be indorsed with the full name of the assignor and assignee, and, when filed by an attorney, shall also be indorsed with his name and business address.

SUB. 10. Filing by assignee.—Should the schedules be filed by the assignee there must be a full affidavit made by such assignee and some disinterested expert showing the nature and value of the property assigned.

SUB. 11. Name and residence.—The name, residence, occupation, and place of business of the assignor, and name and place of residence of the assignee, may be incorporated in the affidavit or annexed to the schedules.

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SUB. 12. *Recapitulation*.—There shall be a recapitulation at the end of the schedules as follows:

Debts and liabilities amount to.....	\$
Assets nominally worth.....	
Assets actually worth.....	

SUB. 13 *Contingent*.—Contingent liabilities shall appear on a separate sheet of paper.

SUB. 14. *Amendments of*.—Application to amend the schedules shall be made by verified petition, in which the amendments sought to be made shall appear in full, and such amendments shall be verified in the same manner as the original schedules were verified.

SUB. 15. *Bond of assignee*.—The bond shall be joint and several in form, and must be accompanied by the affidavit prescribed by § 812 of the Code of Civil Procedure, and also by the affidavit of each surety, setting forth his business and where it is carried on, the amount of his debts and liabilities, and the description and value of property, real or personal, owned by him, so that it may appear that he is worth the amount in which he is required to justify over and above his debts and liabilities.

SUB. 16. *Justification of sureties*.—The court may, in its discretion, require any surety to appear and justify.

SUB. 17. At least one of such sureties shall be a freeholder. If the penalty of the bond be twenty thousand dollars or over, it may be executed by two sureties justifying each in that sum, or by more than two sureties, the amount of whose justification united is double the penalty of the bond.

SUB. 18. *Provisional*.—The affidavit upon which application is made for leave to file a provisional bond must show fully and fairly the nature and extent of the property assigned, and good and sufficient reason must be shown why the schedules cannot be filed, and it must appear satisfactorily to the court that a necessity exists for the filing of such provisional bond, and for the purposes of this act the affidavit so filed shall be deemed a schedule of the assigned property until such time as the regular schedules shall be filed.

Upon the filing of the schedules the amount of the bond will be determined finally, and should the provisional bond already filed be deemed sufficient, an order will be granted making such bond as approved the final bond.

SUB. 19. *Assignee*.—Every assignee shall keep full, exact, and regular books of account of all receipts, payments, and expenditures of money by him, which said books shall always, during business hours, be open to the inspection of any person interested in the trust estate.

SUB. 20. In making sales at auction, of personal property, the assignee shall give at least ten days' notice of the time and place of the sale and of the articles to be sold, by advertisement in one or more newspapers; and he shall give notice of the sale at auction of any real estate at least twenty days before such sale. Upon such sales the assignee shall sell, by printed catalogue, in parcels, and shall file a copy of such catalogue, with the prices obtained for the goods sold, with his final account.

SUB. 21. When any notice is served on the creditors of the insolvent, pursuant to the provisions of the statute or these rules, by mail, every envelope containing such notice shall have upon it a direction to the postmaster at the place to which it is sent, to return the same to the sender within ten days, unless called for. Upon every application made to the court upon such service, an affidavit shall be presented, showing whether any such notices have been returned.

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SUB. 22. Upon an application made for a general citation, the assignee shall file, with his petition, his account, with the vouchers.

SUB. 23. The assignee must file an account in all cases, which shall be referred for examination.

Discharge.—No discharge shall be granted an assignee who has not advertised for claims, pursuant to § 4 of the statute and the 30th subdivision of this rule.

No discharge can be granted an assignee and his sureties, in any case, whether the creditors have been paid or have released or have entered into composition or not, except in a regular proceeding for an accounting, under § 20 of the act, commenced by petition for citation, and citation thereon to all persons interested in the estate.

SUB. 24. *Substituted assignee.*—Whenever an assignee shall have been removed, either on his own petition or on the petition of any person interested in the estate, and another person appointed as assignee in his place and stead, a certified copy of the order made on such petition shall be filed and recorded in the clerk's office of the county wherein the original assignment was recorded, and the clerk of the county shall make such suitable entry, on the margin of the record of the original assignment, as will show the appointment of such substituted assignee, and the said certified copy of the order shall be attached to the original assignment.

SUB. 25. *Account of assignee.*—The account of the assignee shall be in the nature of a debit and credit statement: he shall debit himself with the assets, as shown in the schedules as filed, and credit himself with any decrease, as well as expenses.

SUB. 26. The statement of expenditures shall be full and complete, and the vouchers for all payments shall be attached to the account.

SUB. 27. The affirmative on the accounting shall be with the assignee, and objections to the account may be presented to the referee in writing, or be brought out on a cross-examination, and in the latter case they must be specifically taken and entered in the minutes.

SUB. 28. The testimony taken shall be signed by the several witnesses, and attached to, and filed with, a report of the referee.

SUB. 29. *Report of referee.*—The report of the referee shall show all the jurisdictional facts necessary to confer power on the court, such as the proper execution and acknowledgment of the assignment, the recording of the same, the filing of the schedules and bond, the advertising for creditors, the issuing of the citation, the presenting of the account, and when any items may be disallowed in the account of the assignee, the same shall be fully set out in the report.

SUB. 30. *Notice to present claims.*—A copy of the notice of advertisement requiring creditors to present their claims must be mailed to each creditor whose name appears upon the books of the assignor, with the postage thereon prepaid, at least thirty days before the day specified in such advertisement, and proof of such mailing must be required on the application for a final decree, unless personal service thereof is made upon such creditors.

SUB. 31. The decision of the referee after the trial of a disputed claim, under § 26 of the General Assignment Act, shall be filed with the clerk of the court, and a copy served on the defeated party. The clerk shall, upon application of either party, confirm the said report, and the decision of the referee shall be reviewed only by appeal from the order confirming the report to the appellate division.

CHAPTER XXXVI.

INVESTIGATION OF EXPENDITURES OF TOWNS AND VILLAGES.

General Municipal Law, § 3.

§ 3. General municipal law.

If twenty-five freeholders in any town or village shall present to a justice of the supreme court of the judicial district in which such town or village is situated an affidavit, stating that they are freeholders and have paid taxes on real property within such town or village within one year, that they have reason to believe that the moneys of such town or village are being unlawfully or corruptly expended, and the grounds of their belief, such justice, upon ten days' notice to the supervisor, and the officers of the town disbursing the funds to which such moneys belong, or the trustees and treasurer of the village, shall make a summary investigation into the financial affairs of such town or village, and the accounts of such officers, and, in his discretion, may appoint experts to make such investigation, and may cause the result thereof to be published in such manner as he may deem proper.

The costs incurred in such investigation shall be taxed by the justice, and paid, upon his order, by the officers whose expenditures are investigated, if the facts in such affidavit be substantially proved, and otherwise, by the freeholders making such affidavit. If such justice shall be satisfied that any of the moneys of such town or village are being unlawfully or corruptly expended, or are being appropriated for purposes to which they are not properly applicable, or are improvidently squandered or wasted, he shall forthwith grant an order restraining such unlawful or corrupt expenditure or such other improper use of such moneys.

This section seems to be a substantial re-enactment of chap. 307 of the Laws of 1879, under which it was held that a justice had no power to investigate and correct errors resulting merely from an error of judgment or the foolish expenditures of money by any officer, but only where there was an illegal and corrupt expenditure. Such expenditures are not be deemed unlawful because of a want of skill and judgment in the prosecution of the public work so that it results in little or no benefit to the village, and costs more than it should have cost if the work was done in a proper manner. It was further held that the act of the trustees in repairing a highway outside the village limits in order to facilitate work upon the village streets was not unlawful. *Matter of East Syracuse*, 20 Abb. N. C. 131.

Proceedings under § 3 of the Municipal Law are special proceedings, and are of a remedial nature, designed, first, to prevent the present or future illegal appropriation of public moneys; and second, to determine the financial condition of the town and pre-

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vent future illegal appropriation of public moneys, by pointing out what proper and improper charges have been allowed by former town boards. Thus while the proceeding must be based upon present acts, which contemplate the unlawful expenditure of money already on hand, or hereafter to be produced from the sources of the revenue of the town, experts in their investigation are not limited to the particular year in which the illegal appropriations sought to be restrained are made. *Matter of the Town of Hempstead*, 36 App. Div. 321.

A proceeding taken under this statute is a special proceeding and cannot be reviewed by *certiorari*. The proceeding is instituted "pursuant to a special statutory provision," and costs may be given against the defeated party, and an appeal may lie, since it is an order made by a justice of the Supreme Court in a special proceeding. *People ex rel. Guibord v. Kellogg*, 22 App. Div. 176, citing to the effect that this is a special proceeding, *Matter of King*, 130 N. Y. 602; *Matter of Emmett*, 150 N. Y. 530; *Marvin v. Marvin*, 78 N. Y. 541; *Matter of Ryan*, 72 N. Y. 1; *Matter of Cooper*, 52 N. Y. 67.

As this proceeding is a special proceeding, and under the provisions of § 3240 Code Civil Procedure, the costs to be awarded are in the discretion of the court at the same rates allowed for similar services in an action brought in the same court. In the absence of stipulation, stenographer's fees cannot be taxed as costs, but the fees of experts employed in such proceeding are treated as similar to those of a referee, and are properly taxable. The costs of the investigation cannot be taxed against the officers of the town not made parties to the proceeding, although their bills may be found to be irregular. *Matter of Town the of Hempstead*, 36 App. Div. 321.

Where the village trustees are required by law to audit claims against the village, and audit claims after their payment by the village treasurer, the action of the trustees in merely passing upon the vouchers when they examined the treasurer's accounts at the end of the year, is a substantial violation of the law. The opening of streets and construction of sewers by a committee of the board of trustees, without authority of the trustees, on land not previously acquired by the village, in disregard of the charter, and the payment of expenditures therefor without prior audit, are illegal acts, since it seems that the board of trustees

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has no power to delegate its authority to a committee of that body, as its execution involves the exercise of judgment and discretion. The provisions of a charter which authorize the employment of an attorney "when the business of the board of trustees of the village so requires, by the year or otherwise," justify the employment of counsel to appear before a legislative committee and the governor to urge the passage of a law to bond the village in order to pay for proposed improvements. A taxpayer, although one of the persons who instituted the investigation of the village affairs, may properly be appointed by the court as an expert to examine the village accounts. His relation to the investigation involves his credibility and not his competency. The costs of such investigation, which is a special proceeding, are regulated by § 3240, and the president of the village, who is a member of the board of trustees, may be charged with costs under the statute as one of the officers whose expenditures are investigated. *Matter of Taxpayers of Plattsburgh*, 27 App. Div. 353.

Matter of Taxpayers of Plattsburgh, 27 App. Div. 353, *supra*, was reversed, 157 N. Y. 78, and it was held, among other things, that it was not proper to appoint one of the complainants as an expert to make the investigation, at least without the consent of all parties; that the provision that the trustees might raise a specified sum for sewers, did not prohibit or render illegal payments by the trustees in excess of that sum during any one year with money belonging to the sewer fund for sewers actually constructed in previous years; that the provisions of the Public Health Law with reference to charging expenses upon a municipality, must be regarded as in the nature of an amendment, in part at least, of all municipal charters. Construing §§ 24 and 30 of the Public Health Law, it was further held that the costs of such an investigation must be restricted to those allowed for similar services in an action.

The statute cannot operate to restrain illegal payments by former boards of supervisors, but the fact that the final order in this proceeding assumes to restrain such payments, does not furnish basis for legal error, as such a provision is entirely ineffective. *Matter of the Town of Hempstead*, 36 App. Div. 321. See this case for a discussion of the legality of various town expenses.

The practice in this proceeding, as followed in the *Matter of*

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the Town of Hempstead, 36 App. Div. 321, was as follows: "The proceeding was instituted on the affidavits of thirty-three freeholders of the town, praying for an investigation of the financial affairs of the town and the accounts of the officers, and each and all of the bills and accounts audited and allowed by the officers of the town, etc. The affidavits with notice of motion were served upon the members of the town board, and upon the return thereof, an order was made by the justice, appointing experts as provided in the section, and directing a hearing to be had. Upon such hearing the experts proceed to take, prove, and examine the bills and charges rendered to and audited by the town board, etc.

No precedents are given for this proceeding, since the facts upon which the petition is founded must necessarily differ so widely in each case that a formal petition would be of little or no value.

CHAPTER XXXVII.

ADOPTION OF CHILDREN.

Domestic Relations Law, §§ 60 to 68.

§ 60. Definitions; effect of article.

Adoption is the legal act whereby an adult takes a minor into the relation of child, and thereby acquires the rights and incurs the responsibilities of parent in respect to such minor. Hereafter, in this article, the person adopting is designated the "foster parent." A voluntary adoption is any other than that of an indigent child, or one who is a public charge from an orphan asylum or charitable institution.

An adult unmarried person, or an adult husband or wife, or an adult husband and his wife together, may adopt a minor in pursuance of this article, and a child shall not hereafter be adopted except in pursuance thereof. Proof of the lawful adoption of a minor heretofore made may be received in evidence, and any such adoption shall not be abrogated by the enactment of this chapter and shall have the effect of an adoption hereunder. Nothing in this article in regard to an adopted child inheriting from the foster parent, applies to any will, devise, or trust, made or created before June twenty-fifth, eighteen hundred and seventy-three, or alters, changes, or interferes with such will, devise, or trust, and as to any such will, devise, or trust, a child adopted before that date is not an heir so as to alter estates or trusts, or devises in wills so made or created.

L. 1896, ch. 272, § 60.

§ 61. Whose consent necessary.

Consent to adoption is necessary as follows :

1. Of the minor, if over twelve years of age;
2. Of the foster parents, husband or wife, unless lawfully separated, or unless they jointly adopt such minor;
3. Of the parents or surviving parent of a legitimate child, and of the mother of an illegitimate child; but the consent of a parent who has abandoned the child, or is deprived of civil rights, or divorced because of his or her adultery or cruelty, or adjudged to be insane, or to be an habitual drunkard, or judicially deprived of the custody of the child on account of cruelty or neglect is unnecessary.
4. Of a person of full age having lawful custody of the child, if any such person can be found, where the child has no father or mother living, or no father or mother whose consent is necessary under the last subdivision. If such child has no father or mother living, and no person can be found who has the lawful custody of the child, the judge or surrogate shall recite such facts in the order allowing the adoption.

Id. § 61.

§ 62. Requisites of voluntary adoption.

In adoption the following requirements must be followed :

1. The foster parent or parents, the minor and all the persons whose consent is necessary under the last section, must appear before the county judge or the surrogate of the county where the foster child or parent resides, and be examined by such judge or surrogate, except as provided by the next subdivision.
2. They must present to such judge or surrogate an instrument containing substantially the contents required by this chapter, an agreement on the part of the foster parent or parents to adopt and treat the minor as his, her, or their own lawful child,

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and a statement of the age of the child, as nearly as can be ascertained; which statement shall be taken *prima facie* as true. The instrument must be signed by the foster parent or parents and by each person whose consent is necessary to the adoption, and severally acknowledged by said persons before such judge or surrogate; but where a parent or person or institution having the legal custody of the minor resides or is located in some other State or county, his or their written acknowledged consent, or the written acknowledged consent of the officers of such institution certified, as conveyances are required to be certified to entitle them to record in a county in this State, is equivalent to his or their appearance and execution of such instrument.

Id. § 62.

§ 63. Order.

If satisfied that the moral and temporal interests of the child will be promoted thereby, the judge or surrogate must make an order allowing and confirming such adoption, reciting the reasons therefor, and directing that the minor shall thenceforth be regarded and treated in all respects as a child of the foster parent or parents. Such order, and the instrument and consent, if any, mentioned in the last section must be filed and recorded in the office of the county clerk of such county.

Id. § 63.

§ 64. Effect of adoption.

Thereafter the parents of the minor are relieved from all parental duties toward, and all responsibilities for, and have no rights over, such child, or to his property by descent or succession. Where a parent who has procured a divorce, or a surviving parent, having lawful custody of a child, lawfully marries again, or where an adult unmarried person who has become a foster parent, and has lawful custody of a child, marries, and such parent or foster parent consents that the person who thus becomes the stepfather or the stepmother of such child, may adopt such child, such parent or such foster parent, so consenting, shall not thereby be relieved of any of his or her parental duties toward, or be deprived of any of his or her rights over said child, or to his property by descent or succession. The child takes the name of the foster parent. His rights of inheritance and succession from his natural parents remain unaffected by such adoption. The foster parent or parents and the minor sustain towards each other the legal relation of parent and child, and have all the rights, and are subject to all the duties of that relation, including the right of inheritance from each other, except as the same is affected by the provisions in this section in relation to adoption by a stepfather or stepmother, and such right of inheritance extends to the heirs and next of kin of the minor, and such heirs and next of kin shall be the same as if he were the legitimate child of the person adopting, but as respects the passing and limitation over real or personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the minor is not deemed the child of the foster parent so as to defeat the rights of remaindermen.

As amended L. 1897, ch. 408, § 64.

§ 65. Adoption from charitable institutions.

Where an orphan asylum or charitable institution is authorized to place children for adoption, the adoption of every such child shall, when practicable, be given to persons of the same religious faith as the parents of such child. The adoption shall be affected by the execution of an instrument containing substantially the same provisions as the instrument provided in this article for voluntary adoption, signed and sealed in the corporate name of such corporation by the officer or officers authorized by the directors thereof to sign the corporate names to such instruments, and signed by the foster parent or parents and each person whose consent is necessary to the

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adoption; and may be signed by the child if over twelve years of age, all of whom shall appear before the county judge or surrogate of the county where such foster parent resides and be examined, except that such officers need not appear; and such judge or surrogate may thereupon make the order of adoption provided by this article. Such instrument and order shall be filed and recorded in the office of the county clerk of the county where the foster parent resides and the adoption shall take effect from the time of such filing and recording.

Id. § 65.

§ 66. Abrogation of voluntary adoption.

A minor may be deprived of the rights of a voluntary adoption by the following proceedings only:

The foster parent, the minor, and the persons whose consent would be necessary to an original adoption, must appear before the county judge or surrogate of the county where the foster parent resides, who shall conduct an examination as for an original adoption. If he is satisfied that the abrogation of the adoption is desired by all parties concerned, and will be for the best interests of the minor, the foster parent, the minor, and the persons whose consent would have been necessary to an original adoption shall execute an agreement whereby the foster parent and the minor agreed to relinquish the relation of parent and child and all rights acquired by such adoption, and the parents or guardian of the child or the institution having the custody thereof, agreed to re-assume such relation. The judge or surrogate shall indorse, upon such agreement, his consent to the abrogation of the adoption. The agreement and consent shall be filed and recorded in the office of the county clerk of the county where the foster parent resides, and a copy thereof filed and recorded in the office of the county clerk of the county where the parents or guardians reside, or such institution is located, if they reside, or such institution is located, within this State. From the time of the filing and recording thereof the adoption shall be abrogated, and the child shall re-assume its original name and the parents or guardians of the child shall re-assume such relation. Such child, however, may be adopted directly from such foster parents by another person in the same manner as from parents, and as if such foster parents were the parents of such child.

L. 1896, ch. 272, § 66.

§ 67. Application in behalf of the child for abrogation of an adoption from a charitable institution.

A minor who shall have been adopted in pursuance of this chapter, or of any act repealed thereby, from an orphan asylum or charitable institution, or any corporation which shall have been a party to the agreement by which such child was adopted, or any person on behalf of such child, may make an application to the county judge or the surrogate's court of the county in which the foster parent then resides, for the abrogation of such adoption, on the ground of cruelty, misusage, refusal of necessary provisions or clothing, or inability to support, maintain, or educate such child, or of any violation of duty on the part of such foster parent towards such child; which application shall be by a petition setting forth the grounds thereof, and verified by the person or by some officer of the corporation making the same. A citation shall thereon be issued by such judge or surrogate in or out of such court requiring such foster parent to show cause why the application should not be granted. The provisions of the Code of Civil Procedure relating to the issuing, contents, time, and manner of service of citations issued out of a surrogate's court, and to the hearing on the return thereof, and to enforcing the attendance of witnesses, and to all proceedings thereon, and to appeals from decrees of surrogates' courts, not inconsistent with this

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chapter, shall apply to such citation, and to all proceedings thereon. Such judge or court shall have power to order or compel the production of the person of such minor. If on the proofs made before him, on the hearing of such citation, the judge or surrogate shall determine that either of the grounds for such application exists, and that the interests of such child will be promoted by granting the application, and that such foster parent has justly forfeited his right to the custody and services of such minor, an order shall be made and entered abrogating the adoption, and thereon the status of such child shall be the same as if no proceedings had been had for the adoption thereon.

After one such petition against a foster parent has been denied, a citation on a subsequent petition against the same foster parent may be issued or refused in the discretion of the judge or surrogate to whom such subsequent petition shall be made.

Id. § 67.

§ 68. Application of the foster parent for the abrogation of such an adoption.

A foster parent who shall have adopted a minor in pursuance of this chapter, or of any act repealed thereby, from an orphan asylum or charitable institution, may apply to the county judge or surrogate's court of the county in which such foster parent resides, for the abrogation of such adoption on the ground of the wilful desertion of such child from such foster parent, or of any misdemeanor or ill-behavior of such child, which application shall be by petition, stating the grounds thereof, and the substance of the agreement of adoption, and shall be verified by the petitioner; and thereon a citation shall be issued by such judge or surrogate in or out of such court, directed to such child, and to the corporation which was a party to such adoption, or if such corporation does not then exist, to the superintendent of the poor of such county, requiring them to show cause why such petition should not be granted. Unless such corporation shall appear on the return of such citation before the hearing thereon shall proceed, a special guardian shall be appointed by such judge or court to protect the interests of such child in such proceedings, and the foster parent shall pay to such special guardian such sum as the court shall direct for the purpose of paying the fees and the necessary disbursements in preparing for and contesting such application on behalf of the child. If such judge or surrogate shall determine, on the proofs made before him, on the hearing of such citation, that the child has violated his duty towards such foster parent, and that due regard to the interests of both require that such adoption be abrogated, an order shall be made and entered accordingly; and such judge or court may make any disposition of the child which any court or officer shall then be authorized to make of vagrant, truant, or disorderly children. If such judge or surrogate shall otherwise determine an order shall be made and entered denying the petition.

Id. § 68.

Adoption was unknown to the common law of England and exists in this country only by virtue of statute. The adoption of children and strangers to the blood was however known to the Athenians and Spartans, to the Romans and to the Germans; and the provisions of the Roman law, as modified by Justinian, were transmitted to the modern nations of Europe, and appear in the Code Civil of France, and in the Spanish law. *Matter of Thorne*, 155 N. Y. 143, citing 31 Cent. L. J. 66. As the adoption of

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children was unknown to the common law, it consequently exists in the States of the Union solely by virtue of statute. The first statute of this State was chap. 830 of the Laws of 1873, which defined adoption to be "the legal act whereby an adult person takes a minor in the relation of child and thereby acquires rights and incurs responsibilities of a parent in respect to such minor." This act was amended by chap. 703 of the Laws of 1887, and both acts were repealed by the Domestic Relations Law, chap. 272 of the Laws of 1896, which now provides for the method of adoption.

Special statutes had been enacted prior to that time authorizing charitable institutions to place children committed to their care with persons who consented to take them by adoption. The effect of an attempt to adopt a child by a method not authorized by law is considered in *Carroll v. Collins*, 6 App. Div. 106, citing *Simmons v. Burrows*, 8 Misc. 388; *Hill v. Nye*, 17 Hun, 457, and referring to an unreported case decided at Special Term under the title of *Morrisson v. Morrison*, which is affirmed with costs on the authority of *Carroll v. Collins*, in 11 App. Div. 630. In the *Matter of the Probate of the Will of Joseph Thorn*, deceased, 23 App. Div. 624, the order was affirmed on the authority of the same case, *Carroll v. Collins*.

As regards the constitutionality of a statute authorizing adoption, it has been held that the fact that such statute, as one of its incidents, changed the descent and devolution of property does not render it invalid, unless it defeats vested rights. *Scwald v. Roberts*, 115 Mass. 262. The constitutionality of such acts have also been passed upon in respect to their compliance with various State constitutions in *Nugent v. Powell*, 33 Pac. Rep. 23; *In re Stevens*, 83 Cal. 322; *State v. Meyer*, 63 Ind. 33; *In re Jessops' Estate*, 81 Cal. 408; *People v. Congdon*, 77 Mich. 351.

Where a child adopted by one of the parties, against whom a writ of *habeas corpus* was issued at the instance of the child's uncle, appeared to have been intrusted by her to the other defendant, it was held that the order for the change of custody to the nearest relative was properly granted, notwithstanding the fact that such relative is one who previously consented to the adoption; it appearing that the woman with whom the child lived was at that time living in adultery. *People ex rel. McKinney v. Stinson*, 13 App. Div. 111, 43 Supp. 311. It was held in *People*

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v. *Paschal*, 68 Hun, 344, 32 Supp. 881, that the power of the Supreme Court to control the custody of a child on *habeas corpus* was not taken away by the Laws of 1884, which provided for application to the surrogate's court of the county for the cancellation of an agreement of adoption. Laws 1873, chap. 830, did not require the county judge to witness the consent of the parties adopting; it was enough that the order recited that the parties appeared before him and signed the necessary consents. *People ex rel. Burns v. Bloedel*, 42 St. Rep. 453, 16 Supp. 837.

A parent who has consented to the adoption cannot avoid it by objections going merely to informalities, not affecting his consent, such as the failure of the judge to subscribe the consent and agreement of the person adopted. Precise compliance with the terms of such a statute is not essential. *People ex rel. Burns v. Bloedel*, 4 Supp. 110, 20 St. Rep. 161. The adoption of an illegitimate child by her father is not invalidated by the fact that it does not appear on the face of the papers that she is his illegitimate child. *In re Gregorie's Estate*, 35 Supp. 135, 13 Misc. 363, 25 Civ. Pro. 71. A contract of adoption made in 1844 between the child's parents and the adopters, the consideration being the bringing up of the child, giving her their name, making her their heir, and that if she should survive them to give property to her, made by oral agreement of adoption, and not made with reference to real estate, is not within the statute of frauds, where one of the parties has fully complied with all the requirements. *Godine v. Kidd*, 64 Hun, 585, 29 Abb. N. C. 36, 46 St. Rep. 813, 19 Supp. 335.

Section 13, Laws of 1873, chap. 830, which provided that nothing herein contained shall prevent the proof of the adoption of any child heretofore made, according to any method practised in this State, from being received in evidence; nor such adoption from having the effect of an adoption hereunder, refers only to those forms of adoption theretofore existing by virtue of special statutory enactments contained in the charter of charitable societies that receive destitute and homeless children; and whose offices are permitted to execute agreements of adoption on their behalf with suitable persons willing to assume the obligations of parents. The court says, it is obvious that the Legislature did not have in contemplation the legalizing of private agreements executed without authority of law, and containing no safeguards

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or restrictions of any kind as to the transmission of property. *Matter of Thorne*, 155 N. Y. 140.

It was held that the Laws 1873, chapter 830, regulating adoption, had no retrospective effect. *Hill v. Nye*, 17 Hun, 457. And therefore the consent of parents of a child to his adoption, when the adoption is not under any statute, does not deprive parents of the right to inherit as the child's next of kin. There is no method of adoption which will result in establishing a right of inheritance, except that prescribed by statute; and where a plaintiff claims as an adopted child, a complaint will not be allowed to be amended so as to set up a mere agreement to adopt. *Carroll v. Collins*, 6 App. Div. 106, 40 Supp. 54, 74 St. Rep. 667.

Precedents for Proceedings in County Court. Parent's Affidavit.

ALBANY COUNTY COURT.

In the Matter of the Voluntary Adoption of
Grace Thompson, a minor over the age of
twelve years, by James H. Lane and Isadore
J. Lane, his wife.

STATE OF NEW YORK, }
CITY AND COUNTY OF ALBANY, } ss.:

Eliza R. Thompson, being duly sworn, says,

First. I reside at No. 57 Eagle Street in the said city of Albany, and am the mother of Grace Thompson, whom I am unable to properly maintain, provide for, educate, and support.

Second. My said daughter, Grace Thompson, is a minor over the age of 12 years, and was 13 years of age on the 20th day of December, 1896.

Third. The name of my husband, the father of my said daughter Grace Thompson, was Robert Thompson, who died on or about the 27th day of December, 1889.

ELIZABETH ^{her} × R. THOMPSON.
mark.

Subscribed and sworn to before me }
this 13th day of February, 1897. }

CLIFFORD D. GREGORY,
Albany County Judge.

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Parent's Consent.

ALBANY COUNTY COURT.

In the Matter of the Voluntary Adoption of
Grace Thompson, a minor over the age of
twelve years, by James H. Lane and Isadore J.
Lane, his wife.

I, Elizabeth R. Thompson, of the city and county of Albany, State of New York, do hereby consent that my daughter Grace Thompson, a minor over the age of twelve years, be adopted by James H. Lane, and Isadore J. Lane, his wife, pursuant to the statute in such case made and provided, as their own lawful child, and that my said daughter Grace Thompson be hereafter known as Grace Thompson Lane and be treated in all respects as the lawful child of said James H. Lane and Isadore J. Lane, his wife, and be subject to all the duties of that relation, and, in consideration of the premises, I hereby release and relinquish all my rights to the custody and control of my said daughter, Grace Thompson, as aforesaid, and all my title and interest in her.

Sealed and dated Albany, New York, February 13th, 1897.

ELIZABETH ^{her} × R. THOMPSON. (SEAL.)
mark

In presence of

CHARLES D. BUCHANAN,
CLIFFORD D GREGORY.

County Judge.

STATE OF NEW YORK, }
CITY AND COUNTY OF ALBANY, } ss. :

On this 13th day of February, 1897. before me personally appeared Elizabeth R. Thompson, known to me and to me known to be the person described in and who executed the foregoing instrument, and to me personally acknowledged she executed the same.

CLIFFORD D. GREGORY,

Albany County Judge.

Minor's Consent to Adoption.

(Same title.)

I, Grace Thompson, a minor over the age of twelve years, daughter of Elizabeth R. Thompson, of the city and county of Albany, said State of New York, do hereby consent to my adoption by James H. Lane and Isadore J. Lane, his wife, of said city of Albany, State aforesaid, pursuant to the statute in such case made and provided, and hereby agree to be subject to all the duties of that relation.

Sealed and dated Albany, New York, February 13th, 1897.

GRACE THOMPSON. (SEAL.)

STATE OF NEW YORK, }
CITY AND COUNTY OF ALBANY, } ss. :

On this 13th day of February, 1897, before me personally appeared

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Grace Thompson, known to me and to me known to be the person described in and who executed the above instrument, and to me personally acknowledged that she executed the same.

CLIFFORD D. GREGORY,

Albany County Judge.

Agreement to Adoption.

ALBANY COUNTY COURT.

In the Matter of the Voluntary Adoption of,
etc.

STATE OF NEW YORK, }
CITY AND COUNTY OF ALBANY, } ss.:

We, James H. Lane and Isadore J. Lane, his wife, both being of full age and residing on the New Scotland Plank Road, corner of Grove Avenue, in the city and county of Albany and State of New York, desiring to adopt Grace Thompson, the daughter of Elizabeth R. Thompson, of the said city of Albany, a minor over the age of twelve years, do hereby consent and agree to the adoption by us of said minor Grace Thompson, and that the said Grace Thompson shall take the name of Grace Thompson Lane, and be known as Grace Thompson Lane, and that hereafter she shall sustain towards us and we towards her the relation of parents and child, and have all the rights and be subject to all the duties of that relation, and we further consent and agree that the said Grace Thompson shall be treated in all respects as our own lawful child.

In witness whereof we have hereunto set our hands and seals this 13th day of February, 1897.

JAMES H. LANE. (SEAL.)
ISADORE J. LANE. (SEAL.)

Witness :

CLIFFORD D. GREGORY,
County Judge,

STATE OF NEW YORK, }
CITY AND COUNTY OF ALBANY, } ss.:

On this 13th day of February, 1897, before me severally appeared James H. Lane and Isadore J. Lane, his wife, known to me and to me known to be the persons described in and who executed the foregoing instrument, and to me acknowledged personally that they executed the same.

CLIFFORD D. GREGORY,

Albany County Judge.

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Order.

At a term of the county court held in and for the county of Albany in the city of Albany on the 13th day of February, 1897,
Present :—Hon. Clifford D. Gregory, *Albany County Judge*.

In the Matter of the Voluntary Adoption of
Grace Thompson, a minor over the age of
12 years, by James H. Lane, and Isadore J.
Lane, his wife.

Upon reading and filing the consent and agreement of James H. Lane and Isadore J. Lane, his wife, to the adoption by them of Grace Thompson, an infant over the age of 12 years, and the consent of Elizabeth R. Thompson, the mother of said minor, Grace Thompson, to such adoption, together with the consent of said minor thereto, respectively, dated and acknowledged the 13th day of February, 1897, and the affidavit of Elizabeth R. Thompson, verified the 13th day of February, 1897, by which it appears that Robert Thompson, the husband of said Elizabeth R. Thompson and father of said minor Grace Thompson, is dead, and after due examination by this court of the several parties appearing before it as prescribed by law, and it appearing that the said minor Grace Thompson is over the age of 12 years, and that the said Elizabeth R. Thompson, the mother of said minor, is unable to properly maintain, support, and provide for said minor, and that the said James H. Lane and Isadore J. Lane, his wife, both of full age, are able, competent, and willing to undertake the support, education, and maintenance of said minor Grace Thompson, and are in the judgment of this court fit and proper persons to undertake the adoption of said minor, and the court being satisfied that the moral and temporal interests of said minor will be promoted by said adoption, it is

Ordered and decreed, that the said James H. Lane and Isadore J. Lane, his wife, be and they hereby are authorized and empowered to adopt said minor Grace Thompson as their own child, and that the said minor be hereafter treated in all respects as their own lawful child should be treated, and that the said James H. Lane and Isadore J. Lane, his wife, be and they hereby are deemed to have incurred the responsibilities of parents in respect to such minor, and that said minor be hereafter known by the name of Grace Thompson Lane, and that said James H. Lane and Isadore J. Lane, his wife, on the one part and the said minor Grace Thompson on the other side shall sustain towards each other the legal relation of parent and child and have all the rights and be subject to all the duties of that relation.

Enter in Albany County. CLIFFORD D. GREGORY,

Albany County Judge.

Precedents for Proceeding in Surrogate's Court.—Petition.

To the Surrogate of the County of Albany, in the State of New York :

The petition of Ferdinand Meyer and Isabella Meyer respectfully shows :

Art. I. Precedents.

That your petitioners reside at 51 Howard Street in the city of Albany, N. Y. That your petitioner Ferdinand Meyer is agent for the Union Pacific Tea Company in this city, and your petitioner Isabella Meyer is his wife; that they have no natural living children; that one Anna West of the city of Albany has a child, one Donald West by name, born December 30th, 1897, whom she is not able to care for or support, having no means of her own, being wholly dependent for her support, and being in ill-health and unable to work, and your petitioners are desirous of adopting said Donald West as their own lawful child pursuant to the statute of the State of New York in such case made and provided: that said mother of said child consents to such adoption and has signed a formal assent thereto, which is hereby attached. That your petitioners have sufficient means to properly care for said child, and have now executed and presented herewith the instrument required by section 62 of the Domestic Relations Law, also signed and executed by said mother.

Wherefore, your petitioners pray that the surrogate of Albany County will entertain a proceeding for the adoption of said Donald West by your petitioner as prescribed by said law, and after on due proceedings had an order may be granted, filed, and recorded under said law directing that the said child shall thenceforth be regarded and treated in all respects as your petitioners' own lawful child. And your petitioners pray for such other and further order or relief as may be just and proper in the premises.

FERDINAND MEYER.
ISABELLA MEYER.

STATE OF NEW YORK, }
CITY AND COUNTY OF ALBANY, } ss. :

Ferdinand Meyer and Isabella Meyer, being severally duly sworn, severally say that the statements made in the foregoing petition are true to deponents' knowledge.

FERDINAND MEYER.
ISABELLA MEYER.

Sworn to before me this 7th day }
of March, 1898. }

GEORGE H. FITTS,
Surrogate of Albany County.

Affidavit.

STATE OF NEW YORK, }
CITY AND COUNTY OF ALBANY, } ss.:

Anna West, being duly sworn, says that she is the mother of Donald West, whose adoption has been petitioned for by Ferdinand Meyer and Isabella Meyer, to which adoption she has given her consent, which is annexed hereto. That George West is the husband of deponent and the father of said Donald West. That deponent and said George West were married about five years ago and lived together as husband and wife until August of last year, and at that time they were living at the city of Albany. That in said month of August, 1897, said George West abandoned deponent,

Art. 1. Precedents.

his said wife, leaving her without any notice or warning, and deponent did not know until he had departed that it was his intention to abandon her, since which time deponent did not hear from him directly or indirectly, nor see him, and neither does deponent know of his whereabouts. That since said abandonment he has not contributed to the support or maintenance of deponent, and has done nothing to contribute to the support and maintenance of said Donald West, their child.

ANNA WEST.

Sworn to before me this 7th day }
of March, 1898.

GEORGE H. FITTS,
Surrogate.

Parent's Consent.

In the Matter of the Adoption of Donald West
by Ferdinand Meyer and Isabella Meyer.

I, Anna West, the mother of Donald West, child born December 30th, 1897, having the exclusive custody and control of said child, do hereby consent pursuant to statute to the adoption of said Donald West by said Ferdinand Meyer and Isabella Meyer of the city of Albany, N. Y.

Witness my hand this 7th day of March, 1898. ANNA WEST.

STATE OF NEW YORK, }
CITY AND COUNTY OF ALBANY, } ss. :

On this 7th of March, 1898, before me, the surrogate of Albany County, N. Y., personally came Anna West, to me known and known to me to be the person described in and who executed the foregoing consent, and she acknowledged that she executed the same.

GEORGE H. FITTS,
Surrogate.

Agreement to Adopt.

In the Matter of the Adoption of Donald West
by Ferdinand Meyer and Isabella Meyer.

WHEREAS, Ferdinand Meyer and Isabella Meyer, his wife, being of full age and residing at the city of Albany, N. Y., are desirous of adopting, pursuant to statute in such case made and provided, Donald West, a minor child of Anna West, born on the 30th day of December, 1897; and

WHEREAS, said Ferdinand Meyer and Isabella Meyer and said Anna West now appearing before the undersigned, surrogate of the county of Albany, N. Y.

Now, therefore, the said Ferdinand Meyer and Isabella Meyer do hereby agree to adopt and treat the said Donald West as their own lawful child, and the said Anna West does hereby consent to such adoption.

Art. I. Precedents.

In witness whereof the said Ferdinand Meyer, Isabella Meyer, and Anna West have hereunto set their hands this 7th day of March, 1898.

FERDINAND MEYER,
ISABELLA MEYER,
ANNA WEST.

STATE OF NEW YORK }
CITY AND COUNTY OF ALBANY } ss. :

On this 7th day of March, 1898, before me, the surrogate of Albany County, N. Y., personally came Ferdinand Meyer, Isabella Meyer, and Anna West, to me known and known to me to be the same persons described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same.

GEORGE H. FITTS,
Surrogate.

Order.

In the Matter of the Adoption of Donald West
by Ferdinand Meyer and Isabella Meyer.

Application having been duly made to me at the city of Albany, in the county of Albany, N. Y., by Ferdinand Meyer and Isabella Meyer, residents of said city, for an order allowing and confirming the adoption by them of Donald West, born December 30th, 1897, to which Anna West, the mother of said infant, has consented ; and all of said parties having on this day appeared before me, and after agreement on the part of said foster parents to adopt and treat the said minor as their own lawful child, contained in an instrument that also contained a statement of the age of said minor, and the consent required by law having at the same time been presented to me, signed by said foster parents and the said mother, it appearing that the father has abandoned said child, and the execution thereof having severally been acknowledged by said persons before me this day, and I having examined all persons so appearing before me as aforesaid, and being satisfied that the moral and temporal interests of the said Donald West will be promoted by the said adoption for the following reason, that the said mother of said child is in poor health and has no means of her own own for the support of herself and of said child, and that the said Ferdinand Meyer and Isabella Meyer are persons of abundant means and are fit and proper persons to have the care and custody of said child, and are devoted to the interests of said child ;

I do hereby order that such adoption of Donald West by Ferdinand Meyer and Isabella Meyer be and the same hereby is allowed and confirmed, and

Do hereby direct that the said Donald West be henceforth regarded and treated in all respects as the lawful child of said Ferdinand Meyer and Isabella Meyer, his wife.

Dated at Albany, in the county of Albany, N. Y., this 7th day of March, 1898.

GEORGE H. FITTS,
Albany County Surrogate.

Art. 1. Effect of Adoption.

The provisions of § 13 of chapter 830, Laws 1873, providing that nothing therein contained shall prevent the proof of the adoption of any child heretofore made, etc., applied only to prior adoptions which were authorized by special statute. *Carroll v. Collins*, 6 App. Div. 106, 40 Supp. 54, 74 St. Rep. 667. The adoption of a child according to any method practised in this State made prior to that date was legalized by chapter 830 of the Laws of 1873. Children so adopted have a right under the act of 1887 to inherit both real and personal estate of the person adopting them as if the legitimate children of such persons. *Simons v. Burrows*, 8 Misc. 388, 59 St. Rep. 554, 28 Supp. 624.

Attempted adoption by private agreement prior to the enactment of Laws 1873, chapter 830, is ineffectual to create the relation of foster parent and child, or to give such child any status as a contestant of a will. *Matter of Thorne*, 155 N. Y. 140. It is held, in *Dodin v. Dodin*, 16 App. Div. 42, 44 Supp. 800, affirming 17 Misc. 35, 40 Supp. 748, that a child adopted in 1886, is, under the provisions of the statute of 1873, entitled to take property under the provisions of a will of its adopted father directing that the remainder of the estate shall "descend and be distributed according to the laws of the State of New York."

Where an alleged adopted daughter sought to compel a filing of an inventory, and the adoption was denied, it was held that the surrogate might properly investigate the question of adoption before making the order compelling the filing of the inventory. *Matter of Comins*, 9 App. Div. 492, 41 Supp. 323. A child legally adopted under the laws of another State, substantially similar to our own, is exempt from the Collateral Inheritance Tax. No evidence of formal adoption is required. *Matter of Butler*, 34 St. Rep. 109.

CHAPTER XXXVIII.

PROCEEDINGS TO COMPEL AN ATTORNEY TO PAY OVER MONEYS.

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ARTICLE I.

GENERAL POWERS OF THE COURT.

An attachment will issue against an attorney for not paying over money collected for his client. *People v. Smith*, 3 Cal. 221; *People ex rel. Bacon v. Wilson*, 5 Johns. 368. Where it appears that an attorney has money belonging to his client collected in a professional capacity, which he refuses to pay over, the court will compel him so to do on motion, and will not compel the client to resort to an action. *Matter of Mertian*, 29 Hun, 459, affirmed, on reargument, 17 Weekly Dig. 163.

The remedy for an act of the attorney or counsel not consistent with his relation to the court is by a summary proceeding and not by formal action. *Foster v. Townshend*, 2 Abb. N. C. 29, 68 N. Y. 203, reversing 6 Daly, 136, and partially overruling 12 Abb. Pr. (N. S.) 469. The court has jurisdiction to entertain a summary proceeding by a client against an attorney for misconduct. *Kuhne v. Daley*, 23 Hun, 282.

The Court of Chancery had power to make an order upon petition requiring a solicitor to pay over money collected by him; and will on his default entertain an application to commit him or remove him from the office. *Matter of Bleakley*, 5 Pai. 311. It was said, in *Saxton v. Wyckoff*, 6 Pai. 182, that the Supreme Court is competent to give a complainant against an attorney any equitable relief to which he is entitled, and such court is the appropriate tribunal to settle a controversy between an attorney and client in relation to the duties of the attorney as an officer of the court, and therefore an injunction ought not to be granted to compel a defendant in an action for making an application to

the court to compel an attorney to pay over moneys received in his professional capacity.

The theory upon which the proceeding is based, is that the attorney is an officer of the court, and in order that the proceeding may lie, he must be such officer in respect to the particular wrong which it is sought to repair; and it was at one time held, that where an attorney of the Superior Court of the city of New York, who was also an attorney of the Supreme Court, was retained to defend a suit in the former court, that the Supreme Court had no power to require him to pay over money, but that the matter belonged exclusively to the Superior Court. *Ex parte Ketchum*, 4 Hill, 564. Upon a summary application, the inquiry is, what money has the attorney received belonging to the client, which equity and justice required him to pay over. The proceeding is incident to the equitable powers of the court, and the court should not estop either party by rules of evidence which would prevent the ascertainment of the truth. So held as to the introduction of parol evidence to vary the attorney's receipt. *Purdy v. Stewart*, 16 Weekly Dig. 284.

The provision of the Code of Procedure as to agreements between attorney and client for compensation to the former did not deprive the court of its supervisory power over dealings between attorney and client, and such power will be exercised in a summary way as formerly, to prevent overreaching, oppression, or fraud. *Barry v. Whitney*, 3 Sandf. 696.

It was held, in *Matter of Forster*, 49 Hun, 114, 17 St. Rep. 115, that the summary proceeding in the State courts is not maintainable to require an attorney to pay over money where the services were rendered as counsel of another court not a State court, but a court of separate jurisdiction, and it seems also in this same case, in the opinion of Daniels, J., that even if such summary application would be entertained under the circumstances, yet, several claimants cannot combine in a single proceeding for such purpose.

It has been held, however, that the court may compel an attorney to pay over moneys, although they were collected upon the settlement of an action in another State. *Matter of Batterson v. Osborne*, 44 St. Rep. 837, 18 Supp. 431.

It is in the discretion of the court whether it will proceed by attachment to compel the attorney to pay over money to the

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client, or leave the client to his action, and therefore appeal does not lie to Court of Appeals unless the relief is denied for lack of jurisdiction. *Matter of Schell*, 128 N. Y. 67, 38 St. Rep. 442, affirming 58 Hun, 440, 34 St. Rep. 928, 12 Supp. 790.

The order of a surrogate directing an attorney to deposit money collected for the estate, is discretionary and not appealable. *Matter of De Oraindi*, 31 St. Rep. 744, 9 Supp. 873.

ARTICLE II.

WHO MAY BRING THE PROCEEDING; RELATION OF ATTORNEY AND CLIENT MUST EXIST.

The summary remedy lies only when the money is received by the attorney in a professional capacity, and where a trust arises solely through his relation to his client. *Matter of Husson*, 26 Hun, 130, 62 How. Pr. 358. See this case for facts under which it was held that merely the relation of debtor and creditor existed.

It has been held, however, that in order to entitle a client to the summary remedy, it is sufficient if the attorney received the money in his professional capacity, and it is not necessary that he should have received it in any particular legal proceeding. *Grant's Case*, 8 Abb. Pr. 357; *Ex parte Staats*, 4 Cow. 76. In *Grant's Case*, *supra*, the attorney received money to invest on bond and mortgage, but did not do so, and upon its appearing that he would not have been so employed if he had not been an attorney, it was held that the summary remedy would lie.

As to what constitutes the relation of attorney and client, see *Matter of Larner*, 20 Wkly. Dig. 73, where it was held that where an attorney was employed to avoid an apprehended procedure for foreclosure of a mortgage, his services were professional services, and that money delivered to him for such purpose was received in a professional capacity. The relation of attorney and client exists where the attorney undertakes to collect a claim upon a contingent fee; such a contract does not show the relation of principal and agent. *Matter of Tracey*, 1 App. Div. 113, 37 Supp. 65, 72 St. Rep. 219.

Where an attorney purchased property at a sale on his client's execution, and subsequently sold the same at an advanced price, it was held that he could be compelled summarily to pay over

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the profits to his client, and should be committed to close custody in case of default, and that the amount of such profits could be summarily ascertained by reference. *Matter of Friedman*, 27 Hun, 301.

Where an attorney in a foreclosure action receives his client's surplus moneys, and fails to pay the same over to the referee or county treasurer, a summary proceeding by attachment lies. *Matter of Silvernail*, 45 Hun, 575. It has been held that where an attorney received money in payment of costs awarded to his client on an erroneous order, which order was subsequently reversed, and he has never paid such money over to the client, and still has it in his hands, he may be compelled by order to restore the money upon the reversal of the original erroneous order. *Forstman v. Schulting*, 108 N. Y. 110, affirming 24 Wkly. Dig. 200. As to when the conduct of attorneys in refusing to deliver an extension to the mortgage procured for the client does not indicate good faith, and under what circumstances the court will compel such delivery, see *Matter of Robertson v. Clock*, 18 App. Div. 363, 46 Supp. 87, 80 St. Rep. 87.

Though in most cases it is stated that the summary remedy by attachment lies only where the relation of attorney and client exists. It has been held that where an attorney by fraud procures from the court an order by which he obtains money from a party not his client, he may, nevertheless, be proceeded against summarily by attachment. *Wilmerdings v. Fowler*, 14 Abb. Pr. (N. S.) 249, affirming 45 How. Pr. 142; *s. c. Fowler v. Lowenstein*, 7 Lans. 167. See, however, 15 Abb. Pr. (N. S.) 86, where it was held that the fraud in question was not made out. For a case where a motion was made to compel an attorney to pay a check given to an adverse party, see *Wilkinson v. Gill*, 14 Wkly. Dig. 231.

The summary remedy will only be allowed on motion of the client and will not lie on the motion of one who merely advanced money to the attorney for the client. *Hess v. Joseph*, 7 Robt. 609. The summary remedy does not lie against an attorney to redress wrongs in transactions which have no relation to the acts of the attorney in his professional capacity, even though at the time he was employed as an attorney for the petitioner in other matters. *Matter of Husson*, 13 Wkly. Dig. 542.

It was only where the relation of attorney and client exists

Art. 2. Who May Bring the Proceeding.

that the summary remedy will lie, and there is no such relation between an attorney employed in the prosecution of a case, and other officers of the court, whose services become necessary; and therefore the remedy does not lie in favor of such other court officers against the attorney to compel the payment of the court officers' fees. *Lamoreux v. Morris*, 4 How. Pr. 245.

The summary remedy only lies where the relation of attorney and client exists, and does not lie where the relation is merely one of debtor and creditor; and thus where an attorney has collected counsel fees for his counsel, such fees cannot be collected by the counsel on summary remedy to the court. *Matter of Haskins*, 18 Hun, 42.

It is only where the money is collected in a professional capacity as attorney, that the summary action of the court may be invoked, and though a person be an attorney, if he collect money, or refuse to pay it over in any other than a professional capacity, the summary proceeding does not lie. Thus where an attorney collected money as a land agent, and received such money in his capacity of land agent, and not as an attorney-at-law, it was held that the attachment could not be sustained, but the client must resort to an action. *Matter of Dakin*, 4 Hill, 42. The mere fact that one is an attorney, and also holds a power of attorney over another to collect amount due on a certificate of a benefit society, does not create relation of attorney and client, so as to support summary proceedings to compel the payment of money collected. *Matter of Hillebrandt*, 33 App. Div. 191, 53 Supp. 353.

For a case where it was held that the summary remedy should be denied and the petitioner left to his action on the ground that the relation of attorney and client did not exist, see *Matter of Sardy*, 47 St. Rep. 308, 19 Supp. 575. For a case where it was held that the summary remedy did not lie on the ground that the attorney under the circumstances was not authorized to pay over the money, see *Matter of Smyley*, 46 St. Rep. 824, 19 Supp. 266. Where, in a summary proceeding against an attorney, the value of his services is in dispute, and it is conceded that he has performed some services, the court will not summarily order him to surrender to the client securities which are in his hands. *Matter of McKirvin v. Nafis*, 59 St. Rep. 101, 27 Supp. 723.

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It was held, in *Berks v. Hotchkiss*, 82 Hun, 27, 31 Supp. 16, 63 St. Rep. 354, that the General Term would not interfere in a summary manner in quarrels between attorney and client, unless the former had been guilty of such unprofessional and dishonest conduct as to require his disbarment and discipline; for instance, it will not compel him to carry out a stipulation given in consequence of a failure to apply in time, although charges of deception are made. Where a guardian paid for services performed by an attorney for an infant, it was held that if such services were wrongfully charged to the estate, the remedy was by a settlement of the guardian's account, and that the attorney could not be summarily compelled to pay over the money. *Matter of Holland Trust Company*, 76 Hun, 323, 59 St. Rep. 85, 27 Supp. 687. It was held that the motion to compel the restitution of money received by an adverse attorney, and paid to his client in good faith, should be directed against such client, and not against the attorney. *Elliott v. King*, 3 Month. L. Bul. 60; see *Sims v. Brown*, 6 T. & C. 5, 64 N. Y. 660.

The pendency of the action against an attorney for moneys withheld, in which action he has been arrested, is sufficient ground for refusing the summary remedy. *Matter of Mott*, 36 Hun, 569. If the client proceeds by action to recover money from an attorney wrongfully withheld, it is a waiver of his rights to proceed by attachment. *Cottrell v. Finlayson*, 4 How. Pr. 242, 2 Code R. 116. It has been held, however, in *Gabrial v. Schillinger Fire Proof Cement Co.*, 24 Misc. 313, 52 Supp. 1127, that the bringing of an action at law for the recovery of money from an attorney does not preclude the client from resorting to the summary proceeding, and that where the verdict of a jury established the fact that the attorney received a specified sum from his client to apply to a specific purpose, and failed so to do, the court is warranted in making a summary order for its repayment.

The summary proceeding to compel an attorney to pay over money wrongfully withheld can only be brought by the client, and cannot be brought by an assignee of the client. *Matter of Schell*, 58 Hun, 440, 34 St. Rep. 928, 12 Supp. 790; but see S. C. 128 N. Y. 67; *Bowen v. Smidt*, 49 St. Rep. 647, 20 Supp. 735. For a case where summary proceeding was denied to petitioners who were assignees, see *Matter of Post v. Evarts*, 31 St. Rep. 123, 9 Supp.

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370. But where an assignment of a claim was agreed upon pending an action, with knowledge of the attorney, by whose advice a formal assignment was delayed until after judgment, the assignees may maintain summary proceedings to compel the payment of moneys collected on the judgment, because the attorney will be deemed to have prosecuted the action for the benefit of the assignee. *Matter of Gillespie v. Mulholland*, 12 Misc. 40, 33 Supp. 33, 66 St. Rep. 532, affirming 8 Misc. 511, 59 St. Rep. 407, 28 Supp. 754.

ARTICLE III.

PROCEDURE ; CLAIM OF LIEN ; REFERENCE, ETC.

The papers in a motion to compel an attorney to pay over should not be entitled in the action. *Hess v. Joseph*, 7 Robt. 609. If a firm appears as attorney in an action, it is not necessary to join all the members of the firm in a proceeding to compel the payment of money to the client, where it appeared that the attorney proceeded against personally received the money, and appropriated it to his own personal use. *Matter of Wolfe*, 51 Hun, 407, 21 St. Rep. 224, 4 Supp. 239.

Before a client can have the summary remedy of attachment a demand is necessary. *Ex parte Ferguson*, 6 Cow. 596; *Cottrell v. Finlayson*, 4 How. Pr. 242, 2 Code R. 116. If an attorney withholds money wrongfully, a demand is sufficient to support a summary remedy, even though the demand be for too much, where the attorney refuses to pay over any of the money. *Matter of Ackerman v. Wagner*, 29 St. Rep. 166, 8 Supp. 457, 5 Silv. 443.

It has been held that where parties have been injured by the misconduct of attorneys in an action, an application for a summary remedy should be to the court in which the judgment was recovered. *Weidersum v. Naumann*, 10 Abb. N. C. 149. It has been held in *Grangier v. Hughes*, 56 Super. Ct. 346, 3 Supp. 828, that the summary remedy to compel an attorney to pay over moneys should be made in an action in which the misconduct was committed, and not in an action against the attorney to recover for the misconduct; and in this case it was held, also, that if the attorney fails to object to the maintenance of the proceedings, or to an order of reference until such time

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when an action by a client will be barred by the statute of limitations ; the court will not dismiss the proceedings or remit the petitioner to his action, nor will the fact that the attorney retained the money in good faith in settlement of the controversy as to his right to retain it be a legal answer to the summary application. The Statute of Limitations applies in a summary proceeding for the payment of moneys by an attorney, because such proceeding is a civil remedy, and in order to succeed therein, a legal right must be established. *People v. Brotherson*, 36 Barb. 662 ; *Van Tassel v. Van Tassel*, 31 Barb. 439 ; compare, however, *Grangier v. Hughes*, 3 Supp. 828, 56 Super. Ct. 346. If in a summary proceeding to compel the payment of money by an attorney, who has submitted to the jurisdiction of the court, which proceeding was brought by a receiver of the client, the latter cannot subsequently object that the court had no jurisdiction in the summary application. *Yates v. Heath*, 23 St. Rep. 362.

Upon a summary proceeding to compel an attorney to pay over moneys collected in his professional capacity, the fact that the attorney in good faith claims a lien upon the fund for services does not entitle the attorney as a matter of right to a trial by jury ; but the court may order a reference as to the extent of the claim, and upon the confirmation of the report of such referee showing the balance due the client, the attorney will be ordered to pay it over. *Matter of Fincke*, 6 Daly, 111. Even though the attorney claim a lien in good faith on a fund for services, he will nevertheless, on motion, be summarily compelled to pay the sum over to the client. *Matter of Fincke*, 6 Daly, 111. The mere fact that the attorney claims a lien on the money in good faith is not ground for refusing the summary remedy by attachment. *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489, affirming 64 Barb. 146, distinguished in *Porter v. Parmly*, 39 Super. Ct. (J. & S.) 239. If an attorney retain money collected on his client's judgment in good faith, and under the supposition that he is entitled thereto, under his special contract for services, the court may, nevertheless, summarily order him to pay over such money, although it will consider the circumstances of the case in determining whether the question should be decided summarily. *Matter of Chittenden*, 4 St. Rep. 606, affirmed, without opinion, 105 N. Y. 679.

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In *Sackett v. Breen*, 3^d Supp. 473, it was held that an action was the proper remedy for the recovery of money by a client wrongfully withheld by an attorney, where there is a dispute as to the proper deduction for the attorney's services. It is no answer to a summary application to set up a lien for services. *Matter of Gillespie v. Mulholland*, 12 Misc. 40, 33 Supp. 33, 66 St. Rep. 532, affirming 8 Misc. 511, 59 St. Rep. 407, 28 Supp. 754. It was held that in order to prevent the giving of summary relief by the court, where an attorney asserts a counterclaim, such assertion must be shown sufficiently to justify a formal investigation thereof. *Matter of Tracey*, 1 App. Div. 113, 37 Supp. 65, 72 St. Rep. 219. Where an attorney collected money under an agreement to retain 25 per cent. for his services, he may be ordered summarily to pay over the balance. *Matter of Sprague v. Horton*, 46 St. Rep. 17, 18 Supp. 165. If an attorney collects the claim on instalments he may be compelled to pay over the collections as they are made, and is only entitled to his percentage from the cash actually collected. *Matter of Tracey*, 1 App. Div. 113, 37 Supp. 65, 72 St. Rep. 219, affirmed, 149 N. Y. 608. If upon a summary proceeding there is a disputed question of fact between the attorney and his client as to the existence of a special agreement fixing the attorney's rate of compensation, the court has power to determine such question of fact. *Porter v. Parmly*, 39 Super. Ct. (J. & S.) 219 ; *Matter of Fieldman*, 27 Hun, 301. Questions relating to an attorney's lien, etc., may, in a summary proceeding, be determined by reference. *Brown v. Mayor of New York*, 11 Hun, 21. But see *Matter of Yenni*, 2 Month. L. Bul. 2, where it was held that where the facts as to a contract for services are disputed, the court may leave the client to an action. For a discussion of the power of the court to determine facts upon a reference in this summary proceeding, and a determination as to the amount due under the circumstances, see *Matter of Knapp*, 85 N. Y. 284, reversing 8 Abb. N. C. 308. While the court may order a reference, if there is a dispute as to the facts of the sum due, yet, where the value of the attorney's services can be readily ascertained, it is proper for the court to decide the value, and order the attorney to pay over the remainder without sending the matter to a referee, or compelling the petitioner to resort to an action. *Waterbury v. Eldridge*, 5 Supp. 324. In a proceeding to compel an attor-

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ney to deliver papers, the proper course is to direct a reference to surrender the amount due, where it appears that there is still due the attorney an indefinite amount. *Matter of Taylor Iron & Steel Company v. Higgins*, 49 St. Rep. 645, 20 Supp. 960. A reference may be ordered in the summary proceeding to compel an attorney to pay over money to the client. *Matter of Gillespie v. Mulholland*, 12 Misc. 40, 33 Supp. 33, 66 St. Rep. 532. But where it appears that an attorney has rendered an itemized bill and that it has been paid, there is no occasion for the reference, and the client should be required summarily to pay over moneys due. *Matter of Waterbury v. Eldridge*, 24 St. Rep. 429, 5 Supp. 324, 1 Silv. 292. Where, on a summary motion, there is no dispute as to what services the attorney actually performed, a reference or trial is unnecessary, for the court has only to fix a reasonable amount of compensation for such services. *Ferdon v. Ferdon*, 1 App. Div. 629, 36 Supp. 741, 71 St. Rep. 671. Even if the affidavits by an attorney in a summary proceeding are evasive and unsatisfactory, they cannot be disregarded, and if they present an issue as to the capacity in which he acted, or as to the existence or extent of a lien upon the funds, it is the duty of the court to institute an inquiry by reference, and not to assume that there has been professional misconduct, solely because the attorney's affidavit is distrustful. *Matter of H., an Attorney*, 87 N. Y. 521, 14 Wkly. Dig. 259, 63 How. Pr. 152.

On a summary application, where the attorney is shown to be in possession of his client's money, and was called upon to account, he is bound to show in detail what he has done with it, and to justify its expenditure or retention. *Matter of Raby*, 29 App. Div. 225, 51 Supp. 552. An attorney should not be allowed to retain his client's money for what appeared to be excessive charges, when the only evidence to support such charges is his opinion that they were fair. He should be required to produce legal experience upon the question of the value and the necessity of the services. *Matter of Raby*, 25 Misc. 240, 55 Supp. 87, 89 St. Rep. 87. Where moneys were recovered for the client, and the attorney directed a referee to pay the sum to one to whom the attorney was indebted, the attorney cannot claim that he has not received such moneys on a summary application by the client to compel him to pay over. *Kent v. Rockwell*, 89 Hun, 88, 34 Supp. 1041, 69 St. Rep. 13. If, on a reference in a sum-

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mary proceeding, the attorney sustain a claim to an unliquidated amount due him for services, it is improper to charge him with interest on the balance prior to the commencement of the proceeding. *Grangier v. Hughes*, 56 Supr. Ct. 346, 3 Supp. 828. It was held, in *Matter of Post v. Evarts*, 31 St. Rep. 123, 9 Supp. 370, that an order for the payment of money on a summary application could not be granted, unless the claim of the petitioners is free from every reasonable doubt.

If an attorney fails to pay over the money to his client he is punishable as for a contempt of court. *Matter of Stencirt*, 24 Hun, 246. If an attorney be ordered to pay over money to his client in a particular manner, and refuse, he is guilty of a contempt. *Matter of McBride*, 6 App. Div. 376, 39 Supp. 579. Where an order has once been made requiring an attorney to pay money to his client, he cannot question the order collaterally in a proceeding to punish him for contempt in disobeying the order. *Matter of Bornemann*, 6 App. Div. 524, 39 Supp. 686.

Petition for Order Requiring Respondent to Pay over Money Belonging to Petitioner.

NEW YORK SUPREME COURT—COUNTY OF NEW YORK.

In the Matter of the Application of Mary Raby for an Order Requiring John Doe to pay over moneys received by him belonging to Mary Raby. 29 App. Div. 226.

To the Supreme Court of the State of New York :

The petition of Mary Raby respectfully shows :

First, That your petitioner resides at No. 92 Cherry Street in the city of New York. That one John Doe is and was at all the times hereinafter mentioned an attorney-at-law with an office at No. 5 Beekman Street in this city. That a short time prior to the 3d day of July, 1896, your petitioner was induced by her husband William Raby, to whom she had been married for a period of a little over two months, to accompany him to the office of the said John Doe at No 5 Beekman Street, in the city of New York, for the purpose of completing the arrangements for the procurement of a loan of \$9,000 which he had theretofore negotiated through David Tim, a real estate agent of West 34th Street, in this city, which said loan was to be secured by a mortgage on property then owned by your petitioner at No. 92 and No. 94 Cherry Street in the city of New York.

Second, That afterwards, to wit, upon the 3d day of July, 1896, the said mortgage was executed at the office of the said John Doe, and the amount thereof, to wit, the sum of \$9,000, was paid to your

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petitioner and her husband, William Raby. That out of the said sum of \$9,000 the sum of over \$2,000 was retained by the said John Doe as his fee, as he claimed, for services in closing the loan and in payment for a lien or mortgage which he claimed was then of record against the property. That your petitioner knows now that at that time there were no incumbrances in the way of liens or mortgages of the property. That the only incumbrance against the said property was the taxes and water rates at that time.

Third. That on the said 3d day of July, 1896, your petitioner's husband, William Raby, through fraud, trickery, and deceit, and through representations made by him, that he could better act as manager of said premises by appearing as the owner thereof, induced your petitioner to convey to him the said premises, No. 92 and No. 94 Cherry Street, without any consideration having been paid by him therefor, except upon the understanding that your petitioner was to continue as the owner of said premises and to collect all the rents, and that he, the said William Raby, was to merely act as her agent, and on the further understanding that he, the said William Raby, would not sell, mortgage, or lease the said premises, but would on the request of your petitioner reconvey the said premises to her at any time.

Fourth. That the said John Doe made a statement to your petitioner at this time in the presence of the said William Raby that it would be for her best interests to execute the said deed and that he would arrange it so that your petitioner could have the property returned to her at any time that she requested it.

That accordingly, and relying upon the advice of the said John Doe, your petitioner conveyed to the said William Raby the said premises, who thereafter and in violation of the said agreement not to sell, mortgage, or lease the said premises, did thereafter fraudulently execute divers mortgages, leases, and conveyances of the said premises in fraud of the rights of your petitioner.

Fifth. That shortly after the third day of July, 1896, to wit, on or about the 18th day of July, 1896, your petitioner called at the office of the said John Doe, and had a consultation with him in relation to certain matters, and that while there the said John Doe informed your petitioner that he had been advised that the said William Raby had mortgaged and conveyed the said premises in violation of the said agreement, but that if he were paid the sum of \$500 he would see to it that the property was returned to your petitioner. That your petitioner then delivered to the said John Doe a one thousand-dollar bill, and requested him to return to her the sum of \$500. He responded that the money would be more secure in his safe. That at any time your petitioner wanted the money he would deliver it to her. Your petitioner accordingly allowed the said John Doe to retain the sum of \$500.

Sixth. That subsequently and prior to the 29th day of September, 1896, your petitioner sold certain property of which she was then the owner, situated at No. 294 Dean Street, in the city of Brooklyn. That the said John Doe received from the purchaser as the attorney for your petitioner the sum of \$4,000 as the purchase price therefor, but that he failed to pay over the said sum to your petitioner, and

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out of the said sum your petitioner has received but the sum of \$60, which she used to pay taxes on certain other property then belonging to her. That subsequently when your petitioner called upon the said John Doe for the delivery of the said sum of money the said Doe informed your petitioner that he had the sum deposited with the Farmers' Loan & Trust Company to the credit of your petitioner.

That afterwards your petitioner called at the office of the said Farmers' Loan & Trust Company, and was there informed that there was no money whatever on deposit there to her credit. That when she returned to the office of the said Doe and advised him of the information she had received at the office of the Farmers' Loan & Trust Company he gave to your petitioner a certain paper purporting to be a receipt, in the words and figures following, to wit: \$3,692. 73-100ths (Thirty-six hundred and ninety-two dollars and 73-100) on deposit with the Farmers' Loan & Trust Company, Dated. New York, September 29th 1896. John Doe.

Seventh. That your petitioner has neither received any part of either the said \$3,692. 73, or of the said sum of \$500. That no services whatever were rendered therefor. That the said John Doe has received ample remuneration for whatever services he rendered to your petitioner, he having received for the services performed for your petitioner the sum of \$2,500.

Eighth. That the said John Doe has refused and neglected and still refuses and neglects to pay over to your petitioner the said sum of \$3,692. 73, and the said sum of \$500, respectively, or any part thereof, although payment thereof has been duly demanded, and your petitioner therefore prays that an order issue requiring the said John Doe to pay over to your petitioner the said sum of money now in his possession belonging to your petitioner, and your petitioner will ever pray.

That no other or previous application has been made for an order in the premises.

Dated New York, June 25th, 1898.

GRÜBER & BONYNGE,

(Add verification.)

Attorneys for Petitioner, etc.

Order to Show Cause.

SUPREME COURT—ERIE COUNTY.

In the Matter of the Application of the Heirs of
Rosanna Carlton to Compel the Payment by
her Attorney of Moneys received by him as
such.

150 N. Y. 567.

Upon reading and filing the affidavit of William Foster, verified on the 1st day of May, 1895, the affidavit of George Clinton, verified the 3d day of May, 1895, the affidavit of Vernon Cole, verified the 3d day of March, 1895, the affidavit of Samuel M. Welch, Jr., verified the 3d day of May, 1896, and after hearing George Clinton,

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attorney for Thomas Carleton, Samuel Carleton, etc., etc., and Irving Cole, attorney for J. F. Dorthy.

Now, on motion of George Clinton, it is

Ordered, that John F. Dorthy show cause at a Special Term of this court to be held at the city of Buffalo at the city and county hall, at ten o'clock in the forenoon of the 6th day of May, 1895, why he should not be compelled to pay to the heirs of Rosanna Carleton the sum of \$2,059.40, with interest thereon from the 17th day of November, 1892, or to pay said sum in court or to the referee herein, Samuel M. Welch, Jr., and for such other and further relief as may be proper.

Let service of this order be made by depositing a copy of the same in the postoffice at Buffalo, N. Y., enclosed in a securely sealed wrapper postage prepaid, directed to John F. Dorthy, 1106 Granite Building, Rochester, N. Y., on the 3d day of May, 1895. That service so made will be sufficient.

Order of Reference.

At a Special Term of the Supreme Court held in and for Erie County, N. Y., at the city and county hall in the city of Buffalo, on the 8th day of May, 1895 :

Present :—Hon. Manley D. Green, *Justice, Presiding.*

In the Matter of the Application of the Heirs of
Rosanna Carleton to Compel the Payment by
her Attorney of Moneys received by him as
such.

150 N. Y. 567.

Upon reading and filing the affidavit of William Foster, verified on the 1st day of May, 1895, the affidavit of George Clinton, verified on the 3d day of May, 1895, the affidavit of Vernon Cole, verified on the 3d day of May, 1895, the affidavit of Samuel Welch, Jr., verified on the 3d day of May, 1895, the order to show cause herein made at a Special Term of this court held on the 3d day of May, 1895, and after hearing George Clinton, attorney for Thomas Carleton, Samuel Carleton, etc., and Irving W. Cole, attorney for John F. Dorthy.

Now, on motion of George B. Clinton, it is

Ordered, that Charles B. Wheeler be and he is hereby appointed referee herein to hear and determine the amount and the value of the services of John F. Dorthy and his lien upon the sum of \$2,059.40 now in the possession of the said John F. Dorthy, and which sum was paid to him on the 19th day of November, 1892.

That the hearing on the issues to be determined by said referee shall take place before the said referee at his office in the Erie County Bank Building in the city of Buffalo, N. Y., on the 13th day of May, 1895, and at such other times and places as such referee may adjourn such proceedings. That said referee shall report the evidence adduced before him and his decision thereon, to this court, and that within twenty-four hours after a copy of the decision of the court

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herein has been served upon said John F. Dorthy, said John F. Dorthy shall pay to the referee herein, Samuel M. Welch, Jr., whatever amount shall be found due from said John F. Dorthy over and above his said alleged lien.

Notice of Application to Confirm Referee's Report.

SUPREME COURT—ERIE COUNTY.

In the Matter of the Application of the Heirs
of Rosanna Carleton to Compel the Payment
by her Attorney of Moneys received by him
as such.

150 N. Y. 567.

Please take notice : that upon the affidavit of Vernon Cole, verified on the 12th day of July, 1895, the report and opinion of the referee, Charles B. Wheeler, herein, which has been filed in the office of the clerk of this court on the 12th day of July, 1895, a copy of which report and opinion are hereto annexed, the heirs of Rosanna Carleton, Thomas Carleton, Samuel Carleton, etc., will move this court at a Special Term thereof to be held in the city and county hall in the city of Buffalo, New York, on the 21st day of July, 1895, at ten o'clock A. M., for the confirmation of the report of Charles B. Wheeler, referee, and for an order requiring said John F. Dorthy to pay to the heirs of Rosanna Carleton, or their attorney, the sum of \$1,909.40, with interest thereon from the 1st day of December, 1892, besides the costs and disbursements incurred by said heirs in the proceedings herein before Charles B. Wheeler, referee, and for such other and further relief as may be proper.

Dated Buffalo, N. Y., July 12, 1895.

Yours, etc.,

GEORGE CLINTON,

Attorney for, etc.

Order Confirming Referee's Report.

At a Special Term of the Supreme Court held in and for the county of Erie, in the city and county hall in the city of Buffalo, N. Y., on the 22d day of July, 1895 :

Present :—Hon. Manley C. Green, *Justice*.

In the Matter of the Application of the Heirs
of Rosanna Carleton to Compel the Payment
by her Attorney of Moneys received by him
as such.

150 N. Y. 567.

Upon reading and filing the report of the referee, Charles B. Wheeler, the referee's opinion and report were filed in the office of the clerk of this court the 12th day of July, 1895, the affidavit of Ver-

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non Cole, verified the 12th day of July, 1895, and notice of motion herein dated July 12th, 1895, after hearing George Clinton in support of the motion to confirm the report of the said referee, and Irvin V. Cole in opposition thereto, and it appearing to the satisfaction of this court that John F. Dorthy as attorney has in his possession the sum of \$1,909.40, with interest from the 1st day of December, 1892, amounting in all to the sum of \$2,205.35, belonging to Thomas Carleton, Samuel Carleton, Mary Ann Madill, Esther Hawthorne, Sarah Jane Carleton, Joseph Carleton, William Carleton, and Rosanna Thompson, heirs of Rosanna Carleton, deceased, it is

Ordered, that said report of the referee, Charles B. Wheeler, be and the same hereby is in all respects confirmed and approved ; and it is further

Ordered, that said John F. Dorthy pay said sum of \$2,205.35, in his possession as attorney to George Clinton for and in behalf of the said heirs of Rosanna Carleton within twenty-four hours after the service of a copy of this order upon said John F. Dorthy, exclusive of Sunday ; and it is further

Ordered, that the costs and disbursements incurred by the said heirs of Rosanna Carleton in these proceedings be fixed at \$188.95, and that said \$188.95 be paid to George Clinton, Esq., within the same time as the said sum of \$2,205.35 ; and it is further

Ordered, that in case said John F. Dorthy fails to pay said amount of money within the time prescribed he be deemed in contempt of court.

CHAPTER XXXIX.

DISBARMENT OF ATTORNEYS.

Code Civil Procedure, §§ 56, in part, 67, 68, 69, 73, 74, 75, 76, 77,
78, 79, 80.

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ARTICLE I.

POWER OF THE COURT; WHEN ATTORNEYS MAY BE DIS- BARRED. §§ 56, 67-69, 73-80.

§ 56 (in part.) [Am'd, 1895].

* * * if the appellate division of the Supreme Court shall find such person is of good moral character, it shall enter an order licensing and admitting him to practise as an attorney and counsellor in all courts of the State. Race or sex shall constitute no cause for refusing any person examination or admission to practise. Any fraudulent act or representation by an applicant in connection with his application or admission shall be sufficient cause for the revocation of his license by the appellate division of the Supreme Court granting the same. * * *

L. 1895, ch. 946.

§ 67. [Am'd, 1895.] Suspension from practice.

An attorney and counsellor, who is guilty of any deceit, malpractice, crime, or misdemeanor, or, who is guilty of any fraud or deceit in proceedings by which he was admitted to practise as an attorney and counsellor of the courts of record of this State, may be suspended from practice or removed from office, by the appellate division of the Supreme Court. Any person being an attorney and counsellor-at-law who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practise law as such. Whenever any attorney and counsellor-at-law shall be convicted of a felony there may be presented to the appellate

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division of the Supreme Court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be stricken from the roll of attorneys. Upon a reversal of such conviction, or pardon by the president of the United States or governor of this State, the appellate division shall have power to vacate or modify such order of debarment.

L. 1895, ch. 946.

§ 68. [Am'd, 1895, 1896.] Must be on notice.

Before an attorney or counsellor is suspended or removed, as prescribed in the last section, a copy of the charges against him must be delivered to him, and he must be allowed an opportunity of being heard in his defence. It shall be the duty of any district attorney within the department, when so designated by the appellate division of the Supreme Court, to prosecute all cases for the removal or suspension of attorneys and counsellors as aforesaid. The presiding justice of the appellate division making the said order of designation aforesaid, or the order of reference in such cases, may make an order directing the expenses of such proceedings to be paid by the county treasurer of the county where the attorney or counsellor removed or suspended, or against whom charges were made as aforesaid, had his last known place of residence or principal place of business, which expenses shall be a charge upon such county.

L. 1895, ch. 946 ; L. 1896, ch. 557. In effect Sept. 1, 1896.

§ 69. Removal or suspension, how to operate.

The suspension or removal of an attorney or counsellor, by the Supreme Court, operates as a suspension or removal in every court of the State.

1 R. S. 109, first clause of § 25.

§ 73. Attorney not to buy claim.

An attorney or counsellor shall not, directly or indirectly, buy, or be in any manner interested in buying, a bond, promissory note, bill of exchange, book debt, or other thing in action, with the intent and for the purpose of bringing an action thereon.

§ 74. [Am'd, 1879.] Certain loans prohibited.

An attorney or counsellor shall not, by himself, or by or in the name of another person, either before or after action brought, promise or give, or procure to be promised or given, a valuable consideration to any person, as an inducement to placing, or or in consideration of having placed, in his hands, or in the hands of another person, a demand of any kind, for the purpose of bringing an action thereon. But this section does not apply to an agreement between attorneys and counsellors, or either, to divide between themselves the compensation to be received.

L. 1897, ch. 542.

§ 75. Penalty.

An attorney or counsellor, who violates either of the last two sections, is guilty of a misdemeanor ; and, on conviction thereof, shall be punished accordingly, and must be removed from office by the Supreme Court.

§ 76. Limitation of preceding sections.

The last three sections do not prohibit the receipt, by an attorney or counsellor, of a bond, promissory note, bill of exchange, book debt, or other thing in action, in payment for property sold, or for services actually rendered, or for a debt antecedently contracted ; or from buying or receiving a bill of exchange, draft, or other thing in action for the purpose of remittance, and without intent to violate either of those sections.

2 R. S. 287, § 74.

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§ 77. Same rule when party prosecutes in person.

The last four sections apply to a person prosecuting an action in person, who does an act, which an attorney or counsellor is therein forbidden to do.

L. 1847, ch. 470, part of § 47 (4 Edm. 590).

§ 78. Partner of district attorney, etc., not to defend prosecutions.

An attorney or counsellor shall not, directly or indirectly, advise concerning, aid, or take any part in, the defence of an action or special proceeding, civil or criminal, brought, carried on, aided, advocated, or prosecuted, as attorney-general, district attorney, or other public prosecutor, by a person with whom he is interested or connected, either directly or indirectly, as a law partner ; or take or receive directly or indirectly, from a defendant therein, or other person a fee, gratuity, or reward, for or upon any cause, consideration, pretence, understanding, or agreement whatever, either express or implied, having relation thereto, or the prosecution or defence thereof.

L. 1846, ch. 120, § 1 (4 Edm. 554), am'd.

§ 79. Attorney not to defend when he has been public prosecutor.

An attorney or counsellor, who has brought, carried on, aided, advocated, or prosecuted, or has been in any wise connected with, an action or special proceeding, civil or criminal, as attorney-general, district attorney, or other public prosecutor, shall not, at any time thereafter, directly or indirectly, advise concerning, aid, or take any part in, the defence thereof ; or take or receive, either directly or indirectly, from a defendant therein, or other person, a fee, gratuity, or reward, for or upon any cause, consideration, pretence, understanding, or agreement, either express or implied, having relation thereto, or to the prosecution or defence thereof.

Id. § 2, am'd.

§ 80. Penalty.

An attorney or counsellor, who violates either of the last two sections, is guilty of a misdemeanor ; and, on conviction thereof, shall be punished accordingly, and must be removed from office by the Supreme Court.

Id. § 3.

The court may and ought to cause charges to be preferred against an attorney, whenever satisfied from what has occurred in its presence, or from any satisfactory proof, that a case existed where public good and ends of justice call for it. Upon the return of the order the court will proceed properly to investigate the charges. *In re Percy*, 36 N. Y. 652. See this case for a discussion of the power of the court in removing attorneys and counsellors. At common law the courts had nothing to do with the admission of attorneys or counsellors to practise. (Citing *In re Cooper*, 22 N. Y. 67.) This power of admitting attorneys to practise must therefore be conferred either by the constitution or statute. The court then goes on to discuss the provisions of the Revised Statute, conferring on the court the power to admit persons to practise as attorneys, and also the power of removal

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of such attorneys, as it existed under the Revised Statutes. The court said : " From the above statute the power of removal by the court is derived. * * * It will be seen that the exercise of this power is dependent upon the general conduct of the person, and is not confined to the class of cases where particular individuals have suffered injury from such misconduct." It was insisted by the appellant in this case, that the misconduct which would justify a removal must be some malpractice, or misdemeanor, practised or committed in the exercise of the profession only, and that general bad character or misconduct would not sustain a proceeding. The court says : " I cannot concur in this position. It has been seen that the right of admission to practise is made, both by the constitution and statute, to depend upon the possession of a good moral character, joined with the requisite learning and ability. It is equally important that this character should be preserved after admission, while in the practice of the profession, as that it should exist at the time. It would be an anomaly in the law to make good moral character a prerequisite to admission to an office of a life tenure, while no provision for removal is made in case such character is totally lost. * * * It is true that to warrant a removal the character must be bad in such respects as shows the party unsafe and unfit to be intrusted with the powers of the profession. There are many vices which render the character more or less bad, that have no such tendency. But a want of credibility upon oath does not come within this class. When there can be no reliance upon the word or oath of a party, he is manifestly disqualified, and when such fact satisfactorily appears, the courts not only have the power, but it is their duty, to strike the party from the roll of attorneys. The various cases of removal, after conviction of crime, which have been made can only be sustained upon this view." It was said in the Supreme Court of the United States that the power to remove attorneys from the bar is possessed by all courts which have authority to admit attorneys to practise. *Fradley v. Fisher*, 13 Wall. 344.

In *Matter of Peterson*, 3 Pai. 512, the chancellor said in relation to proceedings for disbarment, that, " solicitors, attorneys, and counsellors are admitted to practise and are entitled to special privileges under the laws of the State for the purpose of enabling them to be useful to their fellow-citizens in the ascertainment,

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prosecution, and defence of their legal and equitable rights. And if such officers abuse the trust which has thus been reposed in them, and conduct themselves in such a manner as to become a nuisance rather than a benefit to the community in which they reside, it is the duty of the court in which they practise, to remove them from their office ; as well for the protection of the office, as to preserve the character of the honorable and useful profession. And this court, so long as I have the honor to preside in it, will not hesitate to discharge that duty fearlessly whenever a proper case for the exercise of the power is presented."

Upon proper proof of the dishonest conduct of an attorney in his professional capacity, it is the duty of the court to punish him by disbarment. *Matter of Ryan*, 143 N. Y. 528, 62 St. Rep. 822. But it is not necessary that the malpractice which will justify the disbarment of an attorney should have been committed in a suit actually pending. It is enough if it be done in his character of attorney ; and thus where a solicitor forged a certificate to a paper, purporting to be an order declaring a marriage void, for the purpose of enabling the husband to induce his wife to believe that she had been legally divorced, it is held, to be a proper cause for removing the solicitor. *Matter of Peterson*, 3 Pai. 510. The word "deceit" as used in § 67, Code Civil Procedure, implies concealment or false suggestion by an attorney to injure a party, or mislead the court while he is acting in his professional capacity. *Matter of Post*, 26 St. Rep. 641, 7 Supp. 438, 4 Silv. 248.

An attorney may be disbarred when he makes charges of corruption against an officer of his own court while sitting in a case ; in so doing he is guilty of unprofessional and improper conduct, when upon being given an opportunity he fails to apologize, and shows neither signs of regret, nor retracts his statements, nor states anything in extenuation thereof. *Matter of Murray*, 33 St. Rep. 831, 11 Supp. 336. It has been held that an attorney is an officer of the court in which he is admitted to practise, and not an officer of the State. *Matter of Burchard*, 27 Hun, 429, citing *Hamilton v. Wright*, 37 N. Y. 502.

An attorney convicted of an infamous crime is disqualified to practise, and the fact that the alleged order disbarring him cannot be found does not avail him. *Matter of Niles*, 5 Daly, 465. A conviction of felony against an attorney forfeits his

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right to practise, and if he be disbarred, a pardon does not entitle him to restoration, though the court may examine the proofs of alleged innocence in order to determine whether or not he ought to be restored. *Matter of E—*, 65 How. Pr. 171 ; see Code Civ. Pro. § 67.

A license to practise as an attorney obtained by one without authority of law is subject to inquiry and examination by the Supreme Court at General Term, and such license may be revoked in a summary proceeding, and it is not necessary that the party making the application should be injuriously affected by the license. *Matter of Burchard*, 27 Hun, 429. A suggestion that the license of an attorney to practise has been illegally granted, or obtained by such attorney, calls upon the court to inquire why such license should not be revoked, and it is not a valid objection to the proceeding that it is brought by another attorney. *Matter of O'Neil*, 27 Hun, 599, 90 N. Y. 584 ; see Code Civ. Pro. § 56.

In *Matter of Baum*, 30 St. Rep. 174, 8 Supp. 771, 5 Silv. 462, it is said that malpractice as a lawyer means evil practice in a professional capacity, and a resorting to methods and practices unsanctioned and prohibited by law. A proper case for disbarment is made out when facts found by a referee prove that the attorney was guilty of unbecoming professional conduct of fraud and deceit towards his clients, offensive to the criminal law. *Matter of Titus*, 50 St. Rep. 636, 21 Supp. 724.

For a case where tampering with witnesses was held to be a fraud upon the court, and professional misconduct, see *Matter of Eldridge*, 82 N. Y. 161. As to unconscionable charges which were held to indicate a depraved professional morality, see *Matter of Powers*, 13 Wkly. Dig. 476. An attorney may be disbarred for converting his client's moneys which have been given him to pay a bond and mortgage. *Matter of Burd*, 9 Wkly. Dig. 562. An attorney may be disbarred for professional misconduct in manufacturing evidence to procure a divorce. *Matter of Gale*, 75 N. Y. 526. It is held to be professional misconduct for an attorney to alter an undertaking used in an unsuccessful application, and again use it in an application to another court, without re-execution or acknowledgment. *Matter of Goldberg*, 79 Hun, 616, 61 St. Rep. 277, 29 Supp. 972. An attorney who furnishes the opposite party with copies of papers intrusted to

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him by his client, even though it be after the relation is at an end, will be disbarred. *Ex parte Hahn*, 11 Abb. N. C. 423. An attorney has been stricken from the rolls for altering a verification. *Matter of Locw*, 5 Hun, 426, 50 How. 373. As to whether an attorney in engaging in vexatious proceedings merely to undermine the final judgment of the court, and to defeat the law, is amenable to the disciplinary power of the court, see *People v. Jugigo*, 128 N. Y. 589, 38 St. Rep. 746. It was held in the Supreme Court of the United States that the obligations which attorneys assume on admission to the bar, are not simply obedience to the Constitution and laws, but also the obligation to maintain, at all times, respect due courts of justice and judiciary officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but also include the abstaining, out of court, from insulting language and offensive conduct towards the judges personally, for their judicial act; and thus a threat of personal chastisement made by an attorney to a judge out of court, for his conduct during a trial, is good ground for striking the name of the attorney from the rolls. *Bradley v. Fisher*, 13 Wall. 344.

If an attorney or counsellor conducts himself in his office dishonestly, he may be removed on a summary process by the court. A felony or an infamous offence will work forfeiture of office, although not committed in his official capacity [see Code Civ. Pro. § 67], but a criminal act, although indictable, will not work a forfeiture of office, unless the offence be one which would disqualify him as a witness, or was committed by him in his official capacity. *Bank of New York v. Stryker*, 1 Wheel. Cr. Cas. 330. And thus it was held that where an attorney drew a check upon a bank in which he had no money, and delivered it in payment, that the act, though highly culpable, was not such an act as to warrant striking him from the roll. *Id.*

It seems that an attorney cannot be disbarred for acts committed as a party to an action. *Matter of Post*, 26 St. Rep. 641, 7 Supp. 438; compare Code Civ. Pro. § 77. An attorney guilty of misconduct in an action or proceeding conducted in his own behalf, is as liable to disbarment as if the disbarment were in the case of another. *Matter of Locw*, 5 Hun, 462, 50 How. 373; see also Code Civ. Pro. § 77, to the same effect.

ARTICLE II

PRACTICE, PUNISHMENT, COSTS, APPEALS.

It was said in the United States Supreme Court that, except where the acts for which an attorney is disbarred occur in open court in the presence of the judges, the power of the court so to disbar should not be exercised without notice to the offending party of the ground of the complaint, and without affording him ample opportunity of inspection and defence. *Bradley v. Fisher*, 13 Wall. 344. A solicitor cannot be stricken from the rolls on motion without filing regular charges, and without a previous order to show cause. *Saxton v. Stowell*, 11 Pai. 526; compare Code Civ. Pro. § 68.

A notice of motion is not the proper practice in instituting a proceeding for disbarment. The proper course is for the complaining party to present the evidence of the facts relied upon, and thereupon the court will look into them, and if it come to the conclusion that the interests of the public, or honor of the profession, require the proceeding, they will direct a rule to show cause. *Anon.*, 22 Wend. 656. It seems that the proper practice in bringing the proceeding before the court to remove an attorney from the rolls of the court, is by an order to show cause founded upon papers presented, to be served, together with the papers, personally upon the attorney. *In re Percy*, 36 N. Y. 651, citing *Anonymous*, 22 Wend. 656; *In re Peterson*, 3 Pai. 510. A proceeding to disbar an attorney should be instituted before the General Term of the Supreme Court, either on affidavits containing the charge to be investigated, or by an order of some other court, alleging the misconduct. Upon such initiation of the proceeding, the court will investigate, on its own motion, as to the sufficiency of the charges. The proceedings cannot be instituted by notice of motion. *Matter of Brewster*, 12 Hun, 109.

If charges of misconduct have been preferred against an attorney, the court, upon the giving in of the report, may fix a date for the hearing, and issue attachment for the purpose of securing the attorney's attendance. *Ex parte Steinert*, 24 Hun, 246. In proceedings to disbar an attorney for professional misconduct, his denial of the charges, and his affidavits and papers upon which the proceedings are instituted, are not evidence upon the issues, but merely perform the office of pleadings, or a statement

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of the charges relied upon. On the trial of the issue, the common-law rules of evidence must be observed. *Matter of Eldridge*, 82 N. Y. 161. The right of an attorney in proceedings to disbar him to be tried by the court on common-law evidence is a personal right, and may be waived by appearance on due notice without objection. *Anon.*, 86 N. Y. 563.

It is no defence to the proceeding to remove an attorney that the court calls upon him to give evidence against himself, because such attorney is not compelled, to be sworn at all, unless he chooses, and may introduce other evidence tending to show his innocence, and submit the matter to the court without being sworn. *In re Percy*, 36 N. Y. 754.

As the proceeding is a penal one, the charges must be sustained by evidence free from serious doubt. *Matter of an Attorney*, 1 Hun, 321. In proceedings to disbar, a commission cannot issue to take testimony without the State, except upon the defendant's consent. *Matter of an Attorney*, 83 N. Y. 164, 23 Albany L. J. 129.

If an attorney has been pardoned after conviction for a felony, the court may, in proceedings to disbar him, take into consideration his conduct in committing the crime, and estimate his character and fitness to practise therefrom. *Matter of Powers*, 13 Wkly. Dig. 476. An attorney charged with professional misconduct may be disbarred by the appellate division without regard to a pending indictment, and he is not entitled to a stay until the charges can be tried by a jury. *Rochester Bar Association v. Dorthy*, 152 N. Y. 596.

The punishment to be inflicted upon an attorney for malpractice depends upon the facts of the particular case. *Matter of Valentine*, 10 App. Div. 491, 76 St. Rep. 268, 42 Supp. 268. Where an attorney is young and inexperienced, the court need not disbar him for misconduct, but may suspend him from practice for a substantial period. *Matter of Goldberg*, 79 Hun, 616, 61 St. Rep. 277, 29 Supp. 972.

It was held under the old chancery practice that the affect of a removal of a solicitor to the Court of Chancery deprived him of the power of practising as solicitor, attorney, or counsellor in any other court. *Matter of Peterson*. 3 Pai. 512; compare Code Civ. Pro. § 69.

In proceedings by an attorney to disbar another, the

 Art. 2. Practice, Punishment, Costs, Appeals.

court has power independent of the Code to order the disbursements and costs of motion to be paid by the applicant, when it is determined that the proceedings were instituted in bad faith. *Matter of Kelly*, 59 N. Y. 595. And upon the non-payment of such costs, it is such misconduct as will allow imprisonment for such non-payment. *Matter of Kelly*, 62 N. Y. 198, affirming 3 Hun, 636, 6 T. & C. 117.

An order suspending an attorney from practice is reviewable in the Court of Appeals. Even though the measure of punishment is a matter of discretion in the court below, the adjudication of guilt or innocence upon the facts presented is a matter for review. *Matter of Eldridge*, 82 N. Y. 161.

Order to Show Cause.

At a General Term of the Supreme Court of the State of New York, held in and for the 5th Judicial Department at the city of Buffalo, N. Y., on the 7th day of June, 1895 :

Present :—Hon. Loran L. Lewis, *Presiding Justice*.

“ George B. Bradley, }	} <i>Associate Justices.</i>
“ Hamilton Ward, }	
“ John M. Davy, }	

In the Matter of the Charges of the Rochester Bar Association,

agst.

John F. Dorthy, Attorney of the Supreme Court of the State of New York.

} 152 N. Y. 596.

On reading and filing the charges of the Rochester Bar Association dated the 6th day of June, 1895, duly verified on that day, of Porter M. French, its president, and by Hiram R. Wood, its secretary, and the affidavits referred to in said verification made by Hiram Wood, secretary, and on motion of Edward Harris, of counsel for said Rochester Bar Association, it is

Ordered, that said John F. Dorthy show cause before this court at this term thereof at the court-house in the city of Buffalo, N. Y., on the 14th day of June, 1895, at the opening of court on that day, or as soon thereafter as counsel can be heard, why said John F. Dorthy should not be suspended from practice and removed from office as an attorney of this court.

Service of copies of this order and of the said charges and the verification thereto, and the said affidavits upon which this said order is granted, on the said John F. Dorthy, personally, by leaving the same at his residence in the city of Rochester, N. Y., on or before the 8th day of June, 1895, shall be sufficient.

JOHN A. GORDON, *Clerk*.

 Art. 2. Practice, Punishment, Costs, Appeals.

Order of Reference.

At a Special Term of the Supreme Court of the State of New York held at the court-house in the city of Buffalo on the 18th day of June, 1895 :

Present :—Hon. Loran L. Lewis, *Justice Presiding*.

“ George B. Bradley, }
 “ Hamilton Ward, } *Associate Justices.*

In the Matter of the charges of the Rochester
 Bar Association,

agst.

John F. Dorthy, an Attorney of the Supreme
 Court of the State of New York.

152 N. Y. 596.

The Rochester Bar Association having heretofore and on the 7th day of June, 1895, presented to this court charges against John F. Dorthy, an attorney and counsellor-at-law of the said court, residing and practising in the city of Rochester, in the county of Monroe, duly verified, wherein the said John F. Dorthy, as such attorney and counsellor-at-law, is charged with having been guilty of deceit, malpractice, crime, and misdemeanor in his office as such attorney ; and the court having on that day made an order directing the service of a copy of such charges on the said John F. Dorthy, and requiring him to show cause why he should not be suspended from practice and removed from office as an attorney of this court, and the said John F. Dorthy having this day appeared before this court and answered said charges, and he having filed his answer denying the same ;

Now, after hearing Edward Harris, counsel for the Rochester Bar Association, and John Van Voorhis, as attorney and counsel for said John F. Dorthy, it is

Ordered, that it be and hereby is referred to Hon. Clarence A. Farnum, attorney of this court, residing in the village of Wellsville, in the county of Alleghany, to take such proofs and evidence as the respective parties may have to offer in regard to such charges, and to report the same with his opinion thereof to the General Term of this court to be held in the city of Rochester on the first Tuesday in October next, at the opening of court on that day or as soon thereafter as counsel can be heard, to which time and place further hearing in this matter by this court is continued. And it is further

Ordered, that the evidence of the charges aforesaid be taken at the city of Rochester at such time as the referee shall appoint on eight days' notice by either party to the other, and either party may bring on the hearing on such notice, and said referee file the evidence so taken by him and his opinion thereon with the clerk of the county of Monroe on or before ten days previous to the first Tuesday of October next, and that this matter be brought to a further hearing before this court on the first Tuesday of October next at the opening

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of court on that day or as soon thereafter as counsel can be heard. It is further

Ordered, that the expenses of this proceeding be paid by the treasurer of the county of Monroe out of any moneys applicable thereto.

JOHN A. GORDON,
Special Deputy Co. Clerk.

Order of Disbarment.

At a term of the appellate division of the Supreme Court of the State of New York held in and for the Fourth Judicial Department at the city of Rochester, on the 17th day of June, 1896:

Present:—Hon. George A. Hardin, *Presiding Justice.*

“ David L. Follet,	} <i>Associate Justices.</i>
“ William H. Adams,	
“ Manly C. Green,	
“ Hamilton Ward,	

In the Matter of the Proceeding to Disbar John F. Dorthy, an Attorney.	} 152 N. Y. 596.

The Rochester Bar Association having, on the 7th day of June, 1895, presented to the General Term of the Supreme Court, then in session at the city of Buffalo, eight separate charges, duly verified, charging the said John F. Dorthy with having been guilty of eight several acts of deceit, malpractice, and crime in the practice of his profession as an attorney and counsellor of the Supreme Court at the city of Rochester, and the said court thereupon having made an order requiring the said John F. Dorthy to show cause why he should not be disbarred, and a copy of the said charges and order having been served upon the said John F. Dorthy, and he having appeared before the said General Term in answer thereto on the 18th day of June, 1895, and having then and there filed an answer under oath denying said charges and each of them; and the said court thereupon having duly made an order referring it to Hon. Clarence A. Farnum, an attorney and counsellor-at-law, residing in the village of Wellsville, in the county of Alleghany, to take the evidence of the respective parties and to report the same with his opinion thereon to the said court:

And an order having been made by the said General Term in session at the city of Rochester on the 26th day of December, 1895, transferring all proceedings in this matter to this appellate division of the Supreme Court; and the report of the said referee having been filed in the office of the clerk of this court at the city of Rochester on the 27th day of February, 1896, together with the said charges and the evidence taken by the said referee, by which report the referee finds that the second, third, fourth, fifth, sixth, seventh, and eighth charges as set forth in the said report were proved; and this matter having been duly brought on for a hearing upon said charges, report and evidence, at a term of this court held at the city of Rochester,

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on the 14th day of April, 1896, and having been fully argued by Mr. Edward Harris, of counsel in support of said report, and by Hon. John M. Van Voorhis, of counsel for said John F. Dorthy, and this court having duly considered the same, finds and determines that the evidence sustains the findings of fact contained in the said referee's report, and the said report is hereby confirmed.

And this court adjudges that the said John F. Dorthy is guilty of the seven acts of deceit, malpractice, and crime in manner and form as the same are set forth in said report.

Now, therefore, on motion of Edward Harris, of counsel, it is

Ordered, that said John F. Dorthy be and he hereby is disbarred and removed from the office of attorney and counsellor-at-law of this court, and that the license granted to him to practise as an attorney and counsel in this court be and it is hereby revoked and annulled.

Allowed and the clerk will enter.

GEORGE A. HARDIN,
Presiding Justice Fourth Department.

NEWELL C. FULTON,
Clerk.

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A very full table of contents will be found at the beginning of the first volume.

The index contains under each topic references to the Code, statutes, text, and forms. In addition, each section of the Code is separately indexed in its numerical order under the title "Code of Procedure," and each form under the head "Precedents." Cross references are very fully given to the subjects treated.

No attempt is made at alphabetical arrangement in giving the references to pages under the subjects, as it tends rather to confuse than to assist, and therefore each topic should be followed in the index until the desired point is found.

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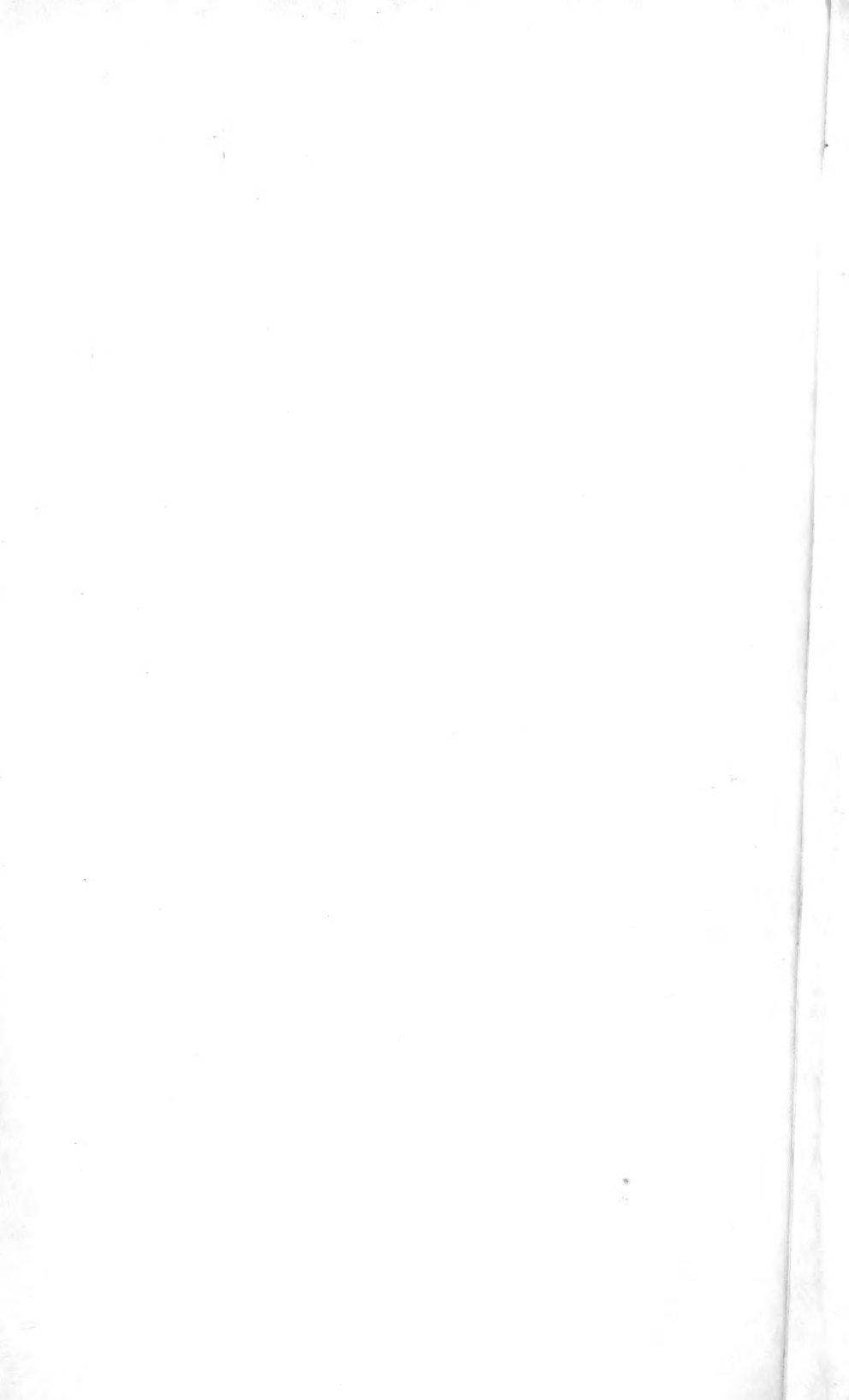
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